IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

W.J. ESTELLE, JR.,

Petitioner

V.

ALBERT H. CARTER,

Respondent

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are *Burks v. United States*, 437 U.S. 1 (1978), and *Greene v. Massey*, 437 U.S. 19 (1978), retroactive?

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NO. 82-_____

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W.J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner herein, by and through his attorney, the Attorney General of Texas, and requests that the Court grant this his petition for writ of certiorari, and as grounds therefor, would respectfully show the Court the following:

OPINIONS BELOW

The United States District Court for the Southern District of Texas, Houston Division, on June 13, 1980, conducted an evidentiary hearing upon Respondent Albert H. Carter's application for writ of habeas corpus

brought pursuant to 28 U.S.C. §2254. At the conclusion of the hearing, the court orally granted the writ of habeas corpus and ordered Respondent released on bond. On July 17, 1980, the court issued an opinion explaining its decision. *Carter v. Estelle,* 499 F.Supp. 777 (S.D.Tex. 1980). (Appendix, hereinafter "App.", A). Final judgement was entered on August 12, 1980. (App. B)

On June 1, 1982, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the judgment. *Carter v. Estelle,* 677 F.2d 427 (5th Cir. 1982). (App. C). That court denied a timely filed petition for rehearing and suggestion of rehearing en banc on November 18, 1982. *Carter v. Estelle,* 691 F.2d 777 (5th Cir. 1982). (App. D).

JURISDICTION

The Court has jurisdiction to review the judgment of the Court of Appeals entered June 14, 1982, and the Court of Appeals' denial of the timely filed petition for rehearing entered November 18, 1982, under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Since this case presents a question of the retroactivity of two of this Court's decisions construing the double jeopardy clause as applied to the states of the United States Constitution, it involves U.S. Const. amends. V, XIV.

STATEMENT OF THE CASE

Carter was convicted of perjury in Cause No. 2158 in the Middle District of Georgia in 1962. In 1969, he was convicted of his second felony offense, embezzlement, in the 174th District Court of Harris County, Texas, in

Cause No. 137,784. For the 1969 conviction, Carter received a sentence of seven years. During his incarceration for the 1969 conviction, he was indicted and convicted in still another case, Cause No. 178,126, again for embezzlement. This third conviction occurred on September 18, 1972, and on October 24, 1972, he was sentenced to life imprisonment. The 1962 and 1969 convictions were used to enhance Carter's sentence to life, and the life sentence was ordered to run consecutively to his seven-year sentence for the 1969 conviction.

Carter appealed his 1972 conviction to the Texas Court of Criminal Appeals. That court reversed his conviction, finding that there was insufficient evidence to establish ownership and control of the money the indictment had charged Carter with embezzling. *Carter v. State,* 510 S.W.2d 323 (Tex.Crim.App. 1974). The Court of Criminal Appeals characterized the evidence as follows:

> The State's proof was that Andrew Dolce was the president of Consolidated Productions, Inc., a seller of plastic toys and animals, and the Appellant was employed as a sales resentative for that corporation, by virtue of which, so Dolce testified, Appellant became his agent. Appellant's duties consisted of calling on and securing orders for plastic items for schools and related organizations interested in selling the items in fund raising projects. Generally the orders secured were entered on an order form on which there was a prominently printed notice that all checks were to be made payable to Consolidated Productions, Inc.
>
> Some of the checks issued in payment for orders secured by Appellant were made payable to and received by Consolidated Productions, Inc.; however, other checks were made payable to either the corporation and Appellant or to

> Appellant and were received by Appellant. These latter checks were deposited in a bank account and withdrawn by Appellant; the proceeds from these checks were not received by the corporation. The office manager of the corporation testified that all payments should have been remitted to the corporation, and that as a result of Appellant's activities, the corporation sustained a loss of approximately forty thousand dollars. Andrew Dolce testified that, although Appellant had authority to receive the checks in his capacity as agent and remit the money to the corporation, he did not give Appellant authority or permission to convert the checks to his own use and benefit. Dolce was not asked if, and he did not testify that, he was the owner of the money alleged to have been embezzled by Appellant, or that, as president of the corporation, he had the care, control and management of such funds.

Carter v. State, 510 S.W.2d 323, 325 (Tex.Crim.App. 1974).

In sum, the State conclusively proved that Carter was stealing money hand-over-first. The State proved that he was stealing it from Consolidated Productions, Inc. The State proved that Andrew Dolce was the president of that corporation. Dolce testified that Carter had no right to appropriate the money to his own use and benefit and that he had stolen it from the corporation. But, in violation of a Texas rule that has since been overruled, *see, Compton v. State,* 607 S.W.2d 246, 249 (Tex.Crim.App. 1980) (en banc) (on motion for rehearing), Dolce did not testify that he was the particular person within the corporation who was the proper custodian of such money. Under the law presently in effect in Texas, there would have been no problem

with the State's proof, for it was evident that Dolce's right of possession to the money was greater than Petitioner Carter's.

There was, however, a problem with the State's case in 1974. The Court of Criminal Appeals ruled that the State's proof was insufficient to show that Andrew Dolce was the "owner" of the property in the manner alleged in the indictment, as then required by Texas law.

Accordingly, the case was remanded to the trial court. Carter filed a "Special Plea" claiming that double jeopardy barred his retrial. The trial court did not specifically pass on the "Special Plea", but Carter was subsequently retried and convicted in 1974 on an identical embezzlement charge. Once again, the 1962 and 1969 felony convictions were used to enhance his sentence to life, this sentence to be served consecutively to the seven year sentence he was already serving for the 1969 conviction.

Carter did not appeal his 1974 conviction. On December 3, 1974, he filed a habeas petition, Cause No. 74-H-1603, attacking the conviction in federal court. After four different amendments by Carter, this petition eventually raised claims attacking the 1974, 1969, and 1962 convictions.

Several years later, in *Burks v. United States*, 437 U.S. 1 (1978), and *Greene v. Massey*, 437 U.S. 19 (1978), this Court ruled that it violates the double jeopardy clause of the United States Constitution to retry a defendant whose initial conviction has been reversed by a state appellate court for insufficient evidence. Eventually, the district court granted habeas corpus relief to Respondent based on retroactive applicatin of the double jeopardy principles established in *Burks* and *Greene*. *Carter v. Estelle*, 499 F.Supp. 777 (S.D.Tex. 1980). (Apps. A,B). The Court of Appeals affirmed this judgment. *Carter v. Estelle*, 677 F.2d 427 (5th Cir.

1982). (App. C). The opinion noted that the principal constitutional issue, involving the retroactivity of *Burks v. United States,* 437 U.S. 1 (1978) and *Greene v. Massey,* 437 U.S. 19 (1978), had been decided in *Bullard v. Estelle,* 665 F.2d 1347 (5th Cir. 1982). Bullard's appeal had previously been consolidated and was later severed from Respondent Carter's appeal in the Fifth Circuit. On June 14, 1982, this Court granted Petitioner's petition for writ of certiorari in *Estelle v. Bullard,* _____U.S._____, 102 S.Ct. 2927 (1982), upon two questions, one of which is identical to the sole issue Petitioner now raises in respondent Carter's case. On January 17, 1983, the Court reversed and remanded the judgment in *Bullard* "for consideration of whether the Texas Constitution, as interpreted by the Texas Court of Criminal Appeals in *Ex Parte Augusta,* ____S.W.2d____ (1982), offers respondent relief on grounds independent of the United States Constitution so as to render inappropriate a decision on federal constitutional grounds."

On November 18, 1982, the Fifth Circuit denied Petitioner's petition for rehearing and suggestion of rehearing en banc. *Carter v. Estelle,* 691 F.2d 777 (5th Cir. 1982). (App. D).

SUMMARY OF THE ARGUMENT

A.

Since the Court on June 14, 1982, granted certiorari in *Estelle v. Bullard,* No. 81-1774, to review the precise question Petitioner now seeks to present in this case, the Court should defer resolution of this petition pending the outcome of *Estelle v. Bullard. See, Estelle v. Bullard,* _____U.S._____, 102 S.Ct. 2927 (1982), or await the outcome of the Court's remand order entered in *Bullard* on January 17, 1983.

B.

Burks v. United States, 437 U.S. 1 (1978) and *Greene v. Massey,* 437 U.S. 19 (1978), cannot help Respondent Carter unless thay are applied retroactively, and it was error for the court below to hold that they should be so applied. Plainly the Court has held that not all double jeopardy decisions are retroactive. The proper test for deciding whether a double jeopardy decision is retroactive under *Robinson v. Neil,* 409 U.S. 505 (1973), emphasizes first the extent of good faith detrimental reliance by law enforcement authorities on the old standards. Here, the good faith aspect of reliance is obvious. The Court found it necessary to overrule many of its own prior cases in handling down the decisions in *Burks* and *Greene.* Those decisions represent a complete reversal of prior precedent.

Detrimental reliance is also shown. Two apparent commonly recurrent prejudicial sets of circumstances emerge. First, at the original trial that ended in reversal, the prosecutor may well have had additional evidence in support of guilt that he would have presented, except that he was totally unaware and could not reasonably have been aware that that was his last opportunity to do so. Under such circumstances, the prosecutor should not be unfairly penalized for having made a good faith legal judgment with a great deal less than knowledge of all circumstances.

Second, and even more likely, if a criminal defendant's sentence is overturned for insufficient evidence, the prosecutor on remand may have more than one option. He may, for example, have had other charges that he could have brought. If he had known that years later *Burks* and *Greene* would be decided, the prosecutor might well have brought other charges. But the prosecutor had no inkling of such legal eventualities, nor can it reasonably

be argued that he should have had such foresight. Detrimental reliance, therefore, is a substantial possibility in many such cases.

C.

Obviously the issue Petitioner presents is an important one. Its resolution will affect the fate of unknowable but significant numbers of state prisoners. The issue is worthy of this Court's review under S.Ct.R. 17.

REASONS FOR GRANTING THE WRIT

A.

RECENTLY THE COURT HAS GRANTED CERTIORARI TO REVIEW THIS CASE.

On June 14, 1981, the Court granted Petitioner's writ of certiorari in *Estelle v. Bullard*, No. 81-1774, to review the precise retroactivity-double jeopardy question Petitioner seeks to raise herein. *See, Estelle v. Bullard*, _____U.S._____, 102 S.Ct. 2927 (1982). The Court should defer action upon the instant petition pending the outcome of *Estelle v. Bullard*.[1] If the judgment is affirmed in *Bullard*, then it may be appropriate to deny the petition for writ of certiorari in this case. If the judgment in *Bullard* is reversed, however, then it undoubtedly will be proper to grant the writ of certiorari in this case, and reverse and remand the judgment for reconsideration in light of the holding in *Bullard*. The Court may wish to defer consideration of this petition until the Court of Appeals has decided *Bullard*.

1. On January 17, 1983, the Court reversed and remanded the judgment in *Bullard* so that the Court of Appeals might determine whether an adequate state ground independently supports the judgment.

B.

THE HOLDINGS IN *BURKS V. UNITED STATES*, AND *GREENE V. MASSEY* SHOULD NOT BE HELD RETROACTIVE.

In *Burks v. United States*, 437 U.S. 1 (1978), and *Greene v. Massey*, 437 U.S. 19 (1978), this Court overruled a long line of its own authorities in order to hold that the Double Jeopardy Clause of the United States Constitution bars retrial when a criminal defendant has obtained an appellate reversal of his case because of insufficiency of the evidence. The Court reasoned that if the evidence were legally insufficient at trial, then theoretically the case should never have been submitted to the jury at all, but instead any defendant who at the close of the State's evidence moved for an instructed acquittal would have been entitled to one.

For this reason, the Court held that all defendants are entitled to the double jeopardy benefits of the State's failure to prove sufficient evidence at its initial opportunity. The Court, however, failed to rule explicitly whether its holding would apply retroactively so as to invalidate the convictions of all defendants who had already been retried and convicted in criminal proceedings supported by sufficient evidence and free of any other constitutional infirmity.

The criteria for determining retroactivity of double jeopardy decisions were set out in *Robinson v. Neil*, 409 U.S. 505 (1973). At issue there was the retroactivity of the double jeopardy holding in *Waller v. Florida*, 397 U.S. 387 (1970).

The Court noted that the analysis embodied in *Linkletter v. Walker*, 381 U.S. 618 (1965), which is based upon protecting "the very integrity of the fact-finding

process,"[2] *id.* at 639, is "not appropriate" in the context of double jeopardy decisions, *Robinson v. Neil* at 509. The Court continued to note, however, the "element of reliance embodied in the *Linkletter* analysis...".

Thus, the Court, cautioning against the view that its rule of decision "is an ironclad one that will invariably result in the easy classification of cases in one category or another,"[3] *id.* at 509, suggested a two-prong good faith reliance and prejudice test. This test would focus first on whether the State's reliance on the prior rule was supported by case law such that the new constitu-

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2. This analysis, as summarized in *Stovall v. Denno*, 388 U.S. 293 (1967), emphasizes the purpose to be served by the new standards, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. *Desist v. United States*, 394 U.S. 244 (1969).

3. Indeed, in the most recent double jeopardy-retroactivity cases located by the State, some have held this Court's double jeopardy decisions to be retroactive, and some refused to do so. In *Mizell v. Attorney General of New York*, 586 F.2d 942 (2d Cir. 1978), *cert. denied*, 440 U.S. 976 (1979), the Court's decision in *Crist v. Bretz*, 437 U.S. 28 (1978), was held retroactive. In *Holt v. Black*, 550 F.2d 1061 (6th Cir.), *cert. denied*, 432 U.S. 910 (1977), the court held *Breed v. Jones*, 421 U.S. 519 (1975), retroactive, whereas a contrary conclusion was reached in *Jackson v. Justices of the Superior Court of Mass.*, 549 F.2d 215 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977). In *United States v. Rumpf*, 576 F.2d 818 (10th Cir. 1976), *cert. denied*, 439 U.S. 893 (1978), the decision in *Abney v. United States*, 431 U.S. 651 (1977), was held to be prospective only. Finally, in *Blackburn v. Cross*, 510 F.2d 1014 (5th Cir. 1975), the court afforded full retroactive status to the collateral estoppel doctrine of *Ashe v. Swenson*, 397 U.S. 436 (1970).

Two other courts have held *Burks* and *Greene* retroactive. The Ninth Circuit did so with no analysis whatsoever in *United States v. Bodey*, 607 F.2d 275 (9th Cir. 1979). And a divided Texas Court of Criminal Appeals so held in *Ex parte Reynolds*, 588 S.W.2d 900 (Tex.Crim.App. 1979), *cert. denied*, 445 U.S. 920 (1980).

tional decision "marked a departure from past decisions of this Court." *Robinson v. Neil* at 511. If so, the State's reliance upon earlier constitutional decisions, both state and federal, would obviously be in good faith. Second, the Court might examine the nature and form of prejudice the State would suffer from retroactive application of the constitutional rule and the extent of the unfairness of such prejudice, compared to the beneficial effect on the valid interests of defendants in such retroactive application.

Applying this test to the facts before it, the Court held *Waller v. Florida* retroactive, stating first that "[the] decision in *Waller* cannot be said to have marked a departure from the past decisions of this Court." *Robinson v. Neil* at 510. The Court in effect held that the State should have realized that municipalities and states were sufficiently parts of one sovereign that criminal prosecution by one would bar later criminal prosecution by the other—the essential holding of *Waller v. Florida.*

By contrast, the decisions of the Court in *Burks v. United States* and *Greene v. Massey* marked a significant departure from prior decisions. The Court itself acknowledged, "The Court's holdings in this area, beginning with *Bryan [v. United States,* 338 U.S. 552 (1950)], can hardly be characterized as models of consistency and clarity." *Burks v. United States,* 437 U.S. at 6. The Court further admitted, "to reach a different result [from the Court of Appeals] will require a departure from the [earlier] holdings." *Id.* To settle the matter the Court stated:

> [O]ur past holdings do not appear consistent with what we believe that the Double Jeopardy Clause commands. A close reexamination of these precedents, however, persuades us that they have not properly construed the Clause, and accordingly, should no longer be followed.

Id. at 12. Thus, the Court overruled "two separate lines of cases including one that was launched with considerable fanfare just three years ago." P. Westen & R. Dribel, "Towards a General Theory of Double Jeopardy," 1978 S.Ct.Rev. 81, 82 & n.8.

Obviously, the law in this area before *Burks* and *Greene*—expecially insofar as whether seeking an appeal constitutes a waiver of the criminal defendant's double jeopardy rights—was on balance contrary to the newly announced constitutional rule.

Texas law for decades has mirrored federal law in this respect. In a long and unbroken line of cases implementing Tex. Code Crim. Proc. Ann. art. 44.25, and its statutory predecessors, the Texas Court of Criminal Appeals has held that a defendant might be retried for the same offense following a reversal for insufficient evidence.[4] Thus, under *Robinson v. Neil*, good faith reliance by Texas law enforcement authorities is not only shown, but cannot seriously be questioned.

Clearly, good faith detrimental reliance—*i.e.*, prejudice—could well have been a reality in many cases. First, for example, if Carter or others similarly situated, might have been tried upon other charges following their first convictions, but the State in good faith believed that they might also validly be retried upon the same charge for which a reversal of the conviction had been obtained, then prejudice or detrimental reliance would be shown.

There are many reasons why the State during the second prosecution might address constitutionally sufficient evidence after failing to do so during the first. Of

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4. After *Burks* and *Greene* the Court of Criminal Appeals held Article 44.25 unconstitutional to the extent of conflict with decisions of the United States Supreme Court. *Johnson v. State*, 571 S.W.2d 4, 6 n. 2 (Tex.Crim.App. 1978).

some importance is the possibility that the passage of time might produce additional evidence. More significantly, the State often possesses inculpatory and even damning evidence that it chooses not to introduce because it may be held inadmissable on appeal. The evidence may be a fruit of a search that the State fears will ultimately be held improper, or a confession that might on appeal be held coerced. The evidence may be of arguable but less than certain admissibility for may other reasons that may cause the prosecution to seek a conviction without it.

It is also possible that the state may withhold weak but legally sufficient evidence because it chooses to rely in good faith but erroneously upon evidence that ultimately on appeal is held to be inadmissable. *See, United States v. Block,* 590 F.2d 535, 540 n. 12 (4th Cir. 1978); Comment, 31 U.Chi.L.Rev. 365 (1964).

The prosecution, however, could not reasonably have foreseen the constitutional difficulty with retrying Carter and, through no fault of the State, he cannot now be retried for any of such charges, the applicable statutes of limitations having long ago expired.

The Court of Appeals' holding that Petitioner failed to show prejudice is equally unpersuasive. The court in effect held that the State should not be heard to complain of prejudice where it had already had one opportunity to muster its proof. There was almost no discussion of Petitioner's precise claims of prejudice.

This Court plainly stated in *Brown v. Louisiana,* 447 U.S. 323, 327 (1979):

> "[I]t is clear that resolution of the question of retroactivity does not automatically turn on the particular provision of the Constitution on which the new prescription is based."

Yet the holding of the Court of Appeals in this case tends toward that precise result.

It should be emphasized that Respondent Carter does not present a case in which doubt has been cast upon the factual accuracy of either the guilty verdict in his first trial or the punishment verdict in his second hearing. In *Ivan V. v. City of New York*, 407 U.S. 203 (1972) [quoted and emphasis added in *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977)], the Court stated as follows:

> Where the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs the truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule has been given a complete retroactive effect. Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has suffered to require prospective application in these circumstances. [citations omitted].

The major purpose of the double jeopardy doctrine is not to protect the integrity of the fact-finding process: instead, it is to preclude the State from harassment of an individual by repeated attempts to incarcerate him. *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969); *Green v. United States*, 355 U.S. 184, 187-88 (1957). Indeed, it is fundamental to principles of double jeopardy that it is preferable that a guilty man go free than be subjected to a forbidden second prosecution.

For these reasons, a question as to the accuracy of the guilty verdict based upon legally insufficient evidence is a sound basis for ordering an acquittal upon direct appeal from such a verdict. Perhaps it is even a sound basis for applying *Burks* and *Greene* to the punishment stage of a criminal trial. In Carter's case, however, any

such question has been obviated by his subsequent trial and the presentation of virtually the same evidence. In any event, there is no longer any question whatsoever as to the correct factual basis of his life sentence.

For these reasons, no reasonable imaginable analysis can militate in favor of a holding that *Burks* and *Greene* are retroactive; if *any* double jeopardy decision should be prospective only, this is it. Accordingly, Petitioner suggests that these cases may be held retroactive only by doing what the Court of Appeals erroneously denied it was doing, *i.e.*, establishing a per se rule that *all* double jeopardy decisions are retroactive. To say that the result follows from the clause's purpose—to prevent a second trial—is to embrace precisely a per se rule. Indeed, some members of this Court recently concurred in a dictum that suggested such a rule in a Fourth Amendment case, *United States v. Johnson*, _____U.S._____, 102 S.Ct. 2579, 2587-88 (1982), although also cautioning that the Court meant to "express no view on the retroactive application of decisions construing any constitutional provision other than the Fourteenth Amendment." _____U.S. at _____, 102 S.Ct. at 2594.

C.

THIS COURT SHOULD REVIEW THIS IMPORTANT ISSUE.

Petitioner cannot know precisely the numbers of convictions that may eventually be invalidated by the holding of the Court of Appeals in this case or similar holdings elsewhere, but each such result is significant. Further, Petitioner submits that both the federal and state judiciary have experienced great difficulty in interpreting and applying *Robinson v. Neil*, 409 U.S. 505 (1973). This case presents an ideal opportunity for the Court to illustrate the proper application of retroactivity priciples in a double jeopardy context.

CONCLUSION

For these reasons, Petitioner respectfully prays that this petition for writ of certiorari be held in abeyance until resolution of *Bullard v. Estelle* in the United States Court of Appeals for the Fifth Circuit, and that following the decision in *Bullard*, that the petition for this case be granted, and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALBERT H. CARTER, *Petitioner,*	§	
V.	§	CIVIL ACTION
	§	NO. H-80-433
W.J. ESTELLE, JR., Director, Texas Department of Corrections, *Respondent.*	§	

MEMORANDUM AND ORDER

On June 13, 1980, the Court heard argument on the respondent's Motion to Dismiss for Failure to Exhaust State Remedies, the petitioner's Motion for Summary Judgment, and the petitioner's Motion for Bail. At the conclusion of the argument, the Court orally denied the respondent's motion to dismiss, granted summary judgment to the petitioner, and denied the motion for bail as moot. It indicated that a written order,outlining the reasons for the actions taken, would be forthcoming. This is that order.

INTRODUCTION

The petitioner was convicted of embezzlement on September 21, 1972, in Cause No. 178,126 in the 185th Judicial District Court of Harris County, Texas. After the jury found him guilty, evidence was submitted indicating that the petitioner had been convicted of perjury in 1962 in the United States District Court for the Middle District of Georgia and of embezzlement in 1969 in Cause No. 127,784 in the 174th District Court of Harris County, Texas. Pursuant to the Texas Recidivist

Act, *Tex. Penal Code Ann.* art. 63[now § 12.42(d)], he was given a mandatory life sentence. The petitioner appealed and, on June 5, 1974, the Texas Court of Criminal Appeals reversed. The conviction, the Court of Criminal Appeals held, had been based on insufficient evidence. *Carter v. State*, 510 S.W.2d 323 (Tex. Crim. App. 1974). Five months later, in November, 1974, the petitioner was retried for the same offense. Although he filed a "Special Plea" in the district court, pursuant to *Tex.Crim.Pro.Code Ann.* art. 27.05, urging that his retrial was barred because of former jeopardy, that action was to no avail. He was reconvicted and sentenced, once again, to life imprisonment. Nearly four years later, in *Burks v. United States*, 437 U.S. 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 24 (1978), the United States Supreme Court, "held that the Double Jeopardy Clause precludes a second trial once a [federal or state] reviewing court has determined that the evidence introduced at trial was insufficient to sustain the verdict." Arguing that *Burks, supra*, and *Greene, supra*, apply retroactively to his 1974 reconviction for embezzlement, the petitioner has moved for summary judgment and release on bail pending a ruling on the merits. The respondent opposed the motions for summary judgment and bail and has moved to dismiss for failure to exhaust state remedies.

EXHAUSTION OF STATE REMEDIES

The motion to dismiss will be dealt with first. The petitioner originally sought habeas corpus relief from this Court on December 3, 1974, in Cause No. 74-H-1603, styled, like the present case, *Carter v. Estelle*. In that action, he attacked both his 1969 embezzlement conviction, for which he had been sentenced to 7 years imprisonment, and his 1974 embezzlement conviction, for which he had been sentenced to life imprisonment. On July 19, 1978, approximately one month after the Supreme Court issued its decisions in *Burks, supra*, and

Greene, supra, the petitioner filed a supplemental petition in 74-H-1603, asserting for the first time that he was entitled to habeas corpus relief because his 1974 retrial and conviction for embezzlement violated the Double Jeopardy Clause. The respondent moved to dismiss for failure to exhaust state remedies under *Galtieri v. Wainwright,* 582 F.2d 348 (5th Cir. 1978), because petitioner Carter had not raised this double jeopardy argument in his state habeas corpus petition. United States Magistrate Ronald J. Blask, in a memorandum and recommendation signed August 18, 1978, recommended that the motion to dismiss be granted and, on August 21, 1978, United States District Court Judge Finis E. Cowan dismissed the petitioner's application for failure to exhaust state remedies.

At this point, the case took an unusual procedural turn. On August 31, 1978, the petitioner filed a motion to vacate Judge Cowan's order. Noting that the petition in 74-H-1603 attacked both his 1969 embezzlement conviction and his 1974 embezzlement conviction, the petitioner pointed out that he had fully exhausted his state remedies as to the former and that his double jeopardy claim under *Burks, supra,* and *Greene, supra,* applied only to the latter. He argued, moreover, that dismissal of 74-H-1603 in its entirety would prevent him from obtaining any federal habeas corpus review of his 1969 conviction. The petitioner had filed 74-H-1603 on December 3, 1974, some five months before he had fully discharged the seven-year sentence associated with the 1969 conviction. Because of that, federal habeas corpus jurisdiction over 74-H-1603 continued to exist under *Carafas v. LaVallee,* 391 U.S. 243 (1968), even after May 17, 1975, when service of the seven-year sentence was completed. It would not, however, the petitioner contended, extend to any federal habeas corpus action filed after May 17, 1975, even if that action had originally been filed in federal court prior to that date and dismissed for failure to exhause state remedies. If justice was to be done, the petitioner claimed, 74-H-1603 could not be dismissed in its entirety.

Magistrate Blask and Judge Cowan agreed. In a memorandum and recommendation signed January 9, 1979, at 7-8, Magistrate Blask discussed the application of the exhaustion requirement laid out in *Galtieri v. Wainwright, supra,* to petitioner Carter's case:

> The *Galtieri* rule is premised upon the principle that, "requiring exhaustion of all claims does not 'bar the federal courthouse door' to any petitioner." *Galtieri v. Wainwright, supra,* at 355. Carter's seven year challenge will, in my judgment, be barred if, as the respondent suggests, the entire petition should be dismissed. Furthermore, ... this petition raises the problem of the appropriate resolution to be made where two distinct convictions arising in two separate state courts in this County are challenged in the same action in federal court .... [I]n order to avoid the harsh consequences engendered by dismissal of petitioner's viable seven year challenge and yet satisfy the demands of the exhaustion doctrine as to the issues raised in the life sentence case, it is Recommended that the Court's Order and Final Judgment dated August 21, 1978, be modified as follows:
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> 1. This cause of action be severed and designated as C.A. No. 74-H-1603-A, incorporating petitioner's independent challenge to his 1969 seven year embezzlement conviction in Cause No. 137,784 in the 174th Judicial District Court of Harris County, Texas, and C.A. No. 74-H-1603-B, encompassing petitioner's independent challenge to his 1974 life sentence imposed in Cause No. 178,126 in the 185th Judicial District Court of Harris County, Texas;
>
> 2. As the Court has previously adopted the Memorandum and Recommendation of the

undersigned that the life sentence (C.A. No. 74-H-1603-B) contains both exhausted and unexhausted claims, said action be dismissed, without prejudice, for failure to exhaust all available state remedies as required by law, and

3. Petitioner's seven year challenge (C.A. No. 74-H-1603-A) be retained on the Court's docket awaiting final disposition of the claims raised therein.

On February 8, 1979, Judge Cowan followed this recommendation, adopting Magistrate Blask's Memorandum and Recommendation as his own.

Approximately one month later, on March 9, 1979, the petitioner filed his state habeas corpus petition in the 185th District Court, Harris County, Texas under Cause No. 178,126C, urging primarily the double jeopardy claim. In his petition, he fully explained the United States District Court's handling of his claims in 74-H-1603. A copy of Judge Cowan's order of February 8, 1979 was attached as an exhibit. The respondent answered on April 30, 1979. On November 14, 1979 the Texas Court of Criminal Appeals, sitting *en banc*, dismissed the petition without prejudice. Its explanation was as follows:

> In his present application, petitioner admits that he has an application for writ of habeas corpus pending in the United States District Court for the Southern District of Texas, Houston Division, in an action styled *Albert H. Carter v. W.J. Estelle, Jr.*, Civil Action No. 74-H-1603.
>
> In *Ex Parte Green*, 548 S.W.2d 914 (Tex.Cr.App. 1977), this Court stated: "A petitioner must decide which forum he will proceed in because this Court will not and the trial court in this state should not

consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter. *Ex Parte Powers*, 487 S.W.2d 101 (Tex.Cr.App. 1972)." *See also Ex Parte McNeil*, [588 S.W.2d 592 (Tex.Cr.App. 1979)].

Nine days later, the petitioner moved for reconsideration of the order of dismissal. His three-page motion and a letter accompanying it carefully and cogently explained the difference between the action dismissed by the Court of Criminal Appeals and the action pending in federal court. For example, the Motion for Reconsideration of Dismissal Order stated, at 1 (emphasis in original):

> This Court dismissed this action without prejudice solely because of a gross misunderstanding by this Court of a single fact. In the second paragraph of [its] dismissal order, this court stated that "petitioner admits" that he has a federal habeas corpus action pending. That much is true, but the pending federal action (No. 74-H-1603-[A]) does *not* attack petitioner's *present* conviction (i.e., cause No. 178,126 in the state District Court). Rather, the federal habeas action attacks *only* Petitioner's *prior* convictions (including a federal conviction and three misdemeanor convictions) which resulted in penal sentences which Petitioner fully discharged many years ago—and as to which the federal court has formally determined that Petitioner has fully exhausted state remedies.

On January 14, 1980, the Texas Court of Criminal Appeals denied the Motion for Reconsideration without written order.

Having failed to obtain relief in state court, the petitioner filed the present action, No. H-80-433. It is, in effect, the same action originally dismissed on February 8,

1979, by Judge Cowan, as 74-H-1603-B, for failure to exhaust state remedies. As has been discussed, it challenges only the 1974 embezzlement conviction. The petitioner, it is clear, has done everything he can, short of dismissing his federal habeas corpus attack on his 1969 embezzlement conviction, to obtain habeas corpus relief in state court. That, however, the respondent maintains, is not good enough. Citing *Galtieri v. Wainwright, supra,* the respondent has moved to dismiss the petitioner's claim, once again, for failure to exhaust state remedies.

In *Galtieri v. Wainwright, supra* at 355, the Fifth Circuit held, "that a federal district court must dismiss without prejudice a 'mixed' petition for a writ of habeas corpus filed by a state prisoner." To determine that dismissal is not required in the present case, one needs only to read the definition of a "mixed" petition provided in *Galtieri v. Wainwright, supra,* at 355:

> A "mixed" petition is one that asserts both exhausted claims and unexhausted claims that do not fit an exception to the exhaustion doctrine; that is, some of the claims have not been presented to the state court system so that the custodial state has not yet had an opportunity to correct all of the alleged constitutional errors.

The petition filed in the instant case is not a "mixed" petition. All of the claims asserted in the petition have previously "been presented to the state court system." "[T]he custodial state," in the words of *Galtieri v. Wainwright, supra,* has had a full, "opportunity to correct all of the alleged constitutional errors."

The respondent contends that the petitioner could obtain relief in state court by dismissing 74-H-1603-A, his federal habeas corpus attack on his 1969 embezzlement conviction. That may be true. Such an action, however, is not required by *Galtieri v. Wainwright, supra.* It will

not be required by this Court. First, United States Magistrate Ronald J. Blask and United States District Court Judge Finis E. Cowan determined almost a year and a half ago that the petitioner's challenge to his 1969 embezzlement conviction, 74-1603-A, need not be dismissed to enable the petitioner to exhaust the remedies available to him in state court to attack his 1974 conviction for embezzlement. They went to great efforts to preserve the petitioner's claim in 74-1603-A and to assure that the petitioner's claim in 74-1603-B would, if not resolved in the petitioner's favor in state court, be ready to be ruled upon when refiled in federal court. To dismiss the present action for failure to exhaust state remedies would be to render those efforts useless. Second, Magistrate Blask and Judge Cowan correctly determined that dismissal of 74-1603-A would "bar the federal courthouse door," *Galtieri v. Wainwright, supra,* at 355, to the petitioner's attack on his 1969 embezzlement conviction. Such a result would be inexcusable.

Third, the failure of the Texas Court of Criminal Appeals to exercise habeas corpus jurisdiction over the present claim is, almost without question, attributable to a factual misunderstanding, a misunderstanding which the petitioner has made every effort to correct. The cases which the Texas Court of Criminal Appeals relied upon in refusing to entertain petitioner Carter's application for writ of habeas corpus firmly establish that the state courts will not accept habeas corpus jurisdiction of a case if the same case is being litigated in federal court. In *Ex parte Powers, supra,* at 102 (emphasis added), the Texas Court of Criminal Appeals said that the, "application for writ of habeas corpus was dismissed ... for the reason that [the federal courts] had retained jurisdiction of *this case.*" In *Ex parte Green, supra,* at 916 (emphasis added), it said, "this Court will not, and a trial court in this State should not, consider a petitioner's application so long as the federal courts retain jurisdiction of the *same matter.*" In *Ex parte*

McNeil, supra, at 593 (emphasis added), the court refused to exercise its jurisdiction because the petitioner had pending in federal court "an application for a writ of habeas corpus seeking the *same relief* that he seeks here." That was not the case with the application that petitioner Carter had pending in federal court. As Magistate Blask and Judge Cowan correctly determined, the petition before the Texas Court of Criminal Appeals and the petition pending in federal court involved, "two distinct convictions arising in two separate state courts." Memorandum and Recommendation signed January 9, 1979, at 7 (Blask, Magistrate), *adopted,* Order of February 8, 1979 (Cowan, J.). The Court of Criminal Appeals, it can be seen, failed to understand the facts. That is unfortunate, to say the least, but it is not the petitioner's fault. *See* Petition for Writ of Habeas Corpus and to Set Bail and exhibits thereto (filed March 9, 1979); Motion for Reconsideration of Dismissal Order and accompanying letter (signed November 23, 1979). It cannot, moreover, prevent this Court from reviewing the petitioner's claim. *See Smith v. Digmon,* 434 U.S. 332 (1978); *Carr v. Alabama,* 586 F.2d 462 (5th Cir. 1978).

Fourth, it is conceivable that the Texas Court of Criminal Appeals did not misunderstand the facts in regard to the petitioner's habeas corpus cases, but, instead, by refusing to entertain the petitioner's claim, intended to adopt a new rule: that state habeas corpus jurisdiction would not extend to a challenge to one conviction pending in federal court, at least when the latter conviction was used to enhance the sentence given for the former conviction. Such a rule, would, however, be a substantial departure from the current rule followed by the Texas courts. *See Ex parte Powers, supra; Ex parte Green, supra; Ex parte McNeil, supra.* It would, moreover, severely impair the flow of multiple offenders' habeas corpus cases through the state and federal systems. In order to obtain state habeas corpus review of convictions obtained after the original filing of a

habeas corpus action in federal court, the petitioner would, presumably, repeatedly have to dismiss and refile his federal habeas corpus case. The delay and disruption would be staggering. Finally, as petitioner Carter's case aptly demonstrates, such a rule would, if respectd by the federal courts, "bar the federal courthouse door," *Galtieri v. Wainwright, supra,* at 355, to many claims. This Court cannot believe that the Texas Court of Criminal Appeals would have adopted such a rule without explicitly saying so. It need not decide, therefore, whether, if such a rule had been adopted, dismissal for failure to exhaust state remedies would be required.

Fifth, "[a] major concern" motivating the Fifth Circuit in *Galtieri v. Wainwright, supra,* at 353-354, was, "that, without the exhaustion doctrine, the state court system would be isolated from federal constitutional issued and would not have an impetus to develop and apply federal constitutional law." That concern has been fully allayed here. As has been noted, the major constitutional issue in the present case is whether *Burks, supra,* and *Greene, supra,* apply retroactively. The Texas courts have already faced that issue. In *Ex parte Mixon,* 583 S.W.2d 378, 379 (Tex. Cr. App. 1979), the Texas Court of Criminal Appeals held that, "the rule of *Burks* and *Greene, supra,* is to be applied retroactively." Dismissal of 74-1603-A, therefore, would not provide the Texas courts with "an impetus to develop and apply federal constitutional law." *Galtieri v. Wainwright, supra,* at 354.

Finally, the position adopted by the respondent at oral argument raises grave doubts about his true motive in advancing the motion to dismiss. To begin with, the respondent acknowledged that to dismiss 74-1603-A would be to bar forever federal habeas corpus review of the petitioner's 1969 conviction, but he kept insisting upon that dismissal anyway, despite the obvious injustice of such a result. The United States Constitution,

it should be remembered, explicitly guarantees access to federal habeas corpus review. *U.S. Const.* art. I, § 9, cl. 2. Furthermore,the respondent virtually conceded at oral argument that the Texas Court of Criminal Appeals would, under *Ex parte Mixon, supra,* find the 1974 embezzlement reconviction unconstitutional and order the petitioner's release. He urged this Court to grant the motion to dismiss because, at this juncture,that court, rather than this one, is the "proper" one to rule on the merits of the petitioner's claim. While arguing in support of the motion, however, the respondent refused to agree to release the petitioner on bail pending the entry of the Court of Criminal Appeals' ruling. That refusal entirely undermines the respondent's argument. The respondent claims to be motivated by respect for the state court system and a concern for procedural regularity and comity. Those interests, however, do not adequately explain the respondent's stance. Respect for the state court system, procedural regularity, and comity do not require service of a sentence which the "proper" court would admittedly find unconstitutional. To the contrary, if the Texas Court of Criminal Appeals is the "proper" court to rule on the merits of the petitioner's claim, proper respect for the state court system would appear to compel the respondent to agree to release the petitioner on bail. His refusal to do so, in conjunction with his concessions as to the Court of Criminal Appeals' view of the merits, casts the respondent's motion to dismiss for failure to exhaust state remedies in a different light. It appears not as an expression of respect for the state courts and concern for procedural regularity and comity, but as an indication of the respondent's desire to keep the petitioner in jail, whether or not he is there unconstitutionally. As such, it will not be countenanced.

"The goal," of *Galtieri v. Wainwright, supra,* at 356, "is to have a petitioner travel through each system [state and federal] only once, at most, in his quest for

vindication of alleged constitutional errors." Petitioner Carter has now traveled through each system at least twice. More is not required. The motion to dismiss for failure to exhaust state remedies will be denied.

SUMMARY JUDGMENT

The petitioner's argument in favor of his motion for summary judgment is a rather simple one. "In *Burks v. United States*, 437 U.S. 1(1978)," the petitioner notes, "the Supreme Court held that the double jeopardy clause of the Fifth Amendment precludes retrial after the reversal of a conviction based on insufficient evidence .... The same day, the court extended that portion of the double jeopardy provision to petitioners convicted in state criminal proceedings. *Greene v. Massey*, 437 U.S. 19 (1978)." Petitioner's Brief in Support of Motion for Summary Judgment and in Opposition to Respondent's Motion to Dismiss for Failure to Exhaust State Remedies, at 11. Four years before those decisions, the petitioner was reconvicted for embezzlement after his original conviction had been overturned for insufficient evidence. *See Carter v. State*, 510 S.W.2d 323 (Crim. App. 1974). The only two courts to face the issue, the Ninth Circuit and the Texas Court of Criminal Appeals, have decided that *Burks, supra*, and *Greene, supra*, apply retroactively. *See United States v. Bodey*, 607 F.2d 265 (9th Cir. 1979); *Ex parte Mixon, supra*. Those courts, the petitioners contends, are correct. *Burks, supra*, and *Greene, supra*, apply retroactively, the petitioner insists, and mandate his release.

The respondent has three responses to the motion for summary judgment. First, he contends that summary judgment is inappropriate as there is a "genuine issue as to [a] material fact." Fed.R.Civ.P. 56. It is undisputed that on October 7, 1974, the day his retrial for conviction began, petitioner Carter filed a "Special Plea" with the trial court, pursuant to *Tex.Crim.Pro.Code Ann.* art. 27.05, asserting that his retrial was, in effect, barred by

the Double Jeopardy Clause. Texas law, the respondent says, requires that a special plea submitted pursuant to Article 27.05 be filed before the trial begins. That being so, if the petitioner filed his "Special Plea" after his retrial started, the respondent maintains, he waived his right to object on double jeopardy grounds. As it is not clear whether the plea filed by the petitioner was filed before or after his retrial began, the respondent contends, summary judgment cannot be granted.

The respondent, it should be noted, conceded at oral argument that it was extremely unlikely that the Texas Court of Criminal Appeals would, if it reached the merits, accept this "waiver" argument. As waiver is, at the first level, a matter of state law, the Court considers that concession to be a damaging one. Regardless of the conclusion the Court of Criminal Appeals might reach, however, the Court finds the respondent's "waiver" argument unconvincing. To begin with, the law in Texas on when a special plea must be filed is not as clear as the respondent claims. In each case in which the courts of Texas addressed the question of when a special plea must be filed, the plea of double jeopardy had been presented for the first time by a motion for new trial after the conclusion of the second trial. *See Galloway v. State,* 420 S.W.2d 721 (Crim. App. 1967); *Watson v. State,* 162 Tex.Cr.R. 156, 282 S.W.2d 715 (1955); *Hill v. State,* 79 Tex.Cr.R. 555, 186 S.W. 769 (1916). Although the cases say that, "former jeopardy must be pleaded before the trial and cannot be raised for the first time on Motion for New Trial, "*Galloway v. State, supra,* at 723, the state courts have never actually faced the question of whether a special plea of former jeopardy filed on the first day of the second trial, but after the trial commences, is sufficient under Texas law.

In addition, if Texas law does, in fact, require that a plea of former jeopardy be filed prior to the commencement of the second trial, that requirement would not

necessarily prevent the federal courts from reaching the merits of petitioner Carter's claims. In *Wainwright v. Sykes*, 433 U.S. 72,84 (1977), the Supreme Court held that waiver pursuant to a state procedural rule would not bar federal habeas corpus review if the petitioner showed "cause for the noncompliance and ... actual prejudice resulting from the alleged constitutional violation." Here, any "noncompliance" by the petitioner could certainly be explained by the fact that retrial in his circumstances had not yet been held to be prohibited by the Double Jeopardy Clause. As for "actual prejudice," there can be little doubt that it is present in the petitioner's case. The Supreme Court, it should be noted, has demonstrated a certain unwillingness to recognize a waiver of a double jeopardy claim. *See Burks, supra*, at 17-18; *Menna v. New York*, 423 U.S. 61 (1975). That unwillingness would undoubtedly extend to the petitioner's case.

Finally and most importantly, for the purposes of this proceeding, it simply does not matter whether petitioner Carter filed his "Special Plea" before or after his retrial started. It does not matter whether he filed his "Special Plea" at all. The Supreme court held that a retrial after a reversal for insufficient evidence constitutes double jeopardy four years after Albert Carter was retried. The respondent conceded that this holding was not foreseeable. Thus, the question is not whether or when petitioner Carter filed his "Special Plea," but whether the decisions in *Burks, supra*, and *Greene, supra*, are to be applied retroactively. In *Miranda v. State of Arizona*, 384 U.S. 436 (1966), the Supreme Court held that the right against self-incrimination prevented the admission of a defendant's confession at trial unless the defendant had been fully appraised of his constitutional rights prior to the time of his confession. One week later, in *Johnson v. State of New Jersey*, 384 U.S. 719 (1966), the Court ruled on the habeas corpus petition of two individuals who had been convicted long before the decision in *Miranda, supra*. Although the petitioners

had never been fully appraised of their constitutional rights, their confessions had been admitted against them at trial. At the time of their trial, it should be noted, the petitioners did not suggest that their confession had been obtained unvoluntarily. They, "expressly relinquished their right under state law to have the issue of voluntariness, and the accompanying evidence, submitted to the jury for redetermination." *Johnson v. State of New Jersey, supra,* at 724. And their counsel, "explicitly asserted that the confessions were truthful and pleaded for leniency on this ground." *Id.* at 725. That, however, did not prevent the Supreme Court from reaching the issue of whether the admission of the petitioner's confessions violated the right against self-incrimination. The Court did not ask whether the defendants had objected to their failure to receive a *Miranda* warning; it knew that, at the time of their trial, neither the petitioners nor anyone else knew that there was such a thing as a *Miranda* warning. The Court simply asked whether it should apply *Miranda, supra,* retroactively. *Id.* at 726. Similarly, in the present case, this Court need not determine whether the petitioner filed a timely objection to his retrial. It simply need determine whether *Burks, supra,* and *Greene, supra,* apply retroactively to prohibit that retrial.

The second argument advanced by the respondent in opposition to the petitioner's motion for summary judgment is that *Burks, supra,* and *Greene, supra,* if applied retroactively, do not require the petitioner's release. *Burks* and *Greene,* the respondent says, hold that a person cannot be retried after his conviction is overturned for insufficient evidence. *Jackson v. Virginia,* ____U.S.____, 99 S.Ct. 2781 (1979), however, the respondent contends, establishes that, for federal habeas corpus purposes, "insufficient evidence" is to be defined as evidence from which, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 2792. As the respondent hastens to point out, the

present proceeding is a federal habeas corpus proceeding. The petitioner's 1972 embezzlement conviction, overturned by the Texas Court of Criminal Appeals in 1974, *see Carter v. State*, 510 S.W.2d 323 (Crim. App. 1974), was, the respondent argues, supported by evidence from which a "rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia, supra.* Therefore, according to the respondent, the petitoner's 1974 reconviction for embezzlement should not be overturned by this Court even if *Burks, supra,* and *Greene, supra,* apply retroactively.

The respondent appears to have confused due process and double jeopardy analysis. In *In re Winship,* 397 U.S. 358, 364 (1970), the Supreme Court held, "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In *Jackson v. Virginia, supra,* at 2786, the Court decreed that a federal court sitting in habeas corpus must declare invalid under the Due Process Clause a conviction obtained in violation of the *Winship* standard. *In re Winship, supra,* and *Jackson v. Virginia, supra,* do not apply to the motion presently under consideration. The petitoner's motion for summary judgment is based not on the Due Process Clause, but on the Double Jeopardy Clause. In *Burks, supra,* the Supreme Court, "held that the Double Jeopardy Clause precludes a second trial once a reviewing court has determined that the evidence introduced at trial was insufficient to sustain the verdict." *Greene, supra,* at 24. In *Greene, supra,* decided the same day, the Supreme Court, exercising its federal habeas corpus jurisdiction, applied the standard announced in *Burks* to state criminal proceedings. It is undisputed that the petitioner in the present case was retried after "a reviewing court," the Texas Court of Criminal Appeals, "determined that the evidence introduced at [his 1972 embezzlement] trial was insufficient to sustain the ver-

dict." *See Carter v. State, supra.* With his motion for summary judgment, the petitioner urges this Court, sitting in habeas corpus, to apply the *Burks* standard to that retrial and declare his conviction invalid. If *Burks, supra,* and *Greene, supra,* apply retroactively, petitioner's motion must be granted.

The third and final argument advanced by the respondent in opposition to the motion for summary judgment is, as it must be, that *Burks, supra,* and *Greene, supra,* do not apply retroactively. The two most relevant Supreme Court decisions are *Linkletter v. Walker,* 381 U.S. 618 (1965), and *Robinson v. Neil,* 409 U.S. 505 (1973). In *Linkletter v. Walker, supra,* the Court discussed the retroactive application of its decisions at length and stated that only decisions interpreting procedural rules which affected, "the very integrity of the fact-finding process," *id.* at 639, would be applied retroactively. In *Robinson v. Neil, supra,* at 508, however, faced with the question of whether to apply *Waller v. Florida,* 397 U.S. 387 (1970), a double jeopardy decision, retroactively, the Court said that the *Linkletter* test was, "simply not appropriate." "The guarantee against double jeopardy," the Court explained in *Robinson v. Neil, supra,* at 509:

> is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to proscribe procedural rules that govern the conduct of a trial.

Waller v. Florida, supra, the Supreme Court held, was, "to be accorded full retroactive affect." *Robinson v. Neil, supra,* at 511.

To this Court's knowledge, two courts have faced the question of whether *Burks, supra,* and *Greene, supra,* are to be applied retroactively: the Ninth Circuit in *United States v. Bodey,* 607 F.2d 258 (9th Cir. 1979), and the Texas Court of Criminal Appeals in *Ex parte Mixon, supra,* and *Ex parte Reynolds,* 588 S.W.2d 900 (Tex. Cr. App. 1979). Relying on *Robinson v. Neil, supra,* both responded in the affirmative. This Court agrees. It finds particularly persuasive the analysis employed by the Texas Court of Criminal Appeals in *Ex parte Reynolds, supra,* at 902-904, and, without repeating it, hereby adopts that analysis as its own. The petitioner's 1974 retrial for embezzlement violated the Double Jeopardy Clause. This Court, unfortunately, cannot stop the retrial from taking place. It can, however, declare the trial invalid and order the petitioner's release. That is what the Constitution requires. This is what the Court will do.

CONCLUSION

For the reasons stated above, it is hereby ORDERED, ADJUDGED, and DECREED that the respondent's Motion to Dismiss For Failure to Exhaust State Remedies be, and the same is, DENIED; that the petitioner's Motion for Summary Judgment be, and the same is, GRANTED; and that the petitioner's Motion for Bail be, and the same is, DENIED AS MOOT. The court finds that the 1974 conviction of the petitioner for embezzlement violated the constitutional prohibition against double jeopardy. It hereby ORDERS, therefore, that the petitioner's application for a writ of habeas corpus be, and the same is, GRANTED and that the petitioner be RELEASED from custody.

DONE at Houston, Texas, this 17th day of July, 1980.

/s/ Gabrielle K. McDonald

United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALBERT H. CARTER, *Petitioner,*	§	
V.	§	CIVIL ACTION NO. H-80-433
W.J. ESTELLE, JR., Director, Texas Department of Corrections, *Respondent.*	§	

FINAL JUDGMENT

In accordance with the Court's Memorandum and Order entered July 17, 1980, this action is hereby DISMISSED. Pursuant to the petitioner's specific request, it is hereby DECLARED that the decision in *Carter v. State,* 510 S.W.2d 323 (Tex. Cr. App. 1974) and this Court's Memorandum and Order of July 17, 1980, entitle the petitioner to a judgment of acquittal in Cause No. 178,126, styled the State of Texas vs. Albert H. Carter, in the 185th District Court of Harris County, Texas.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this 12th day of August, 1980.

/s/ Gabrielle K. McDonald

United States District Judge

APPENDIX C

ALBERT H. CARTER, *Petitioner-Appellee,*

v.

W.J. ESTELLE, JR., Director, Texas Department of Corrections, *Respondent-Appellant.*

No. 80-1981.

United States Court of Appeals, Fifth Circuit.

June 1, 1982.

Appeal from the United States District Court for the Southern District of Texas.

Before POLITZ and RANDALL, Circuit Judges, and PARKER*, District Judge.

RANDALL, Circuit Judge:

This case involves two questions: (1) whether petitioner Albert H. Carter met the requirements of the exhaustion doctrine before bringing the present federal habeas corpus action and (2) whether his 1974 retrial and conviction for embezzlement violated the double jeopardy clause. The district court below held that state remedies had been exhausted, found for Carter on his substantive claims, and ordered him released. The State of Texas has appealed this decision. We affirm. Our view is that Carter has no available and effective state remedy in the state courts and has met the requirements of exhaustion doctrine. We also agree with the district court's analysis of the double jeopardy

* Chief Judge of the Middle District of Louisiana, sitting by designation.

issue, which in several ways anticipated our own later decision in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982).

I. THE HISTORY OF THIS LITIGATION.

Carter was convicted of perjury in Cause No. 2158 in the Middle District of Georgia in 1962. In 1969, he was convicted of his second felony offense, embezzlement, in the 174th District Court of Harris County, Texas, in Cause No. 137,784. For the 1969 conviction, Carter received a sentence of seven years. During his incarceration for the 1969 conviction, he was indicted and convicted in still another case, Cause No. 178,126, again for embezzlement. This third conviction occurred on September 18, 1972, and on October 24, 1972, he was sentenced to life imprisonment. The 1962 and 1969 convictions were used to enhance Carter's sentence to life, and the life sentence was ordered to run consecutively to his seven-year sentence for the 1969 conviction.

Carter appealed his 1972 conviction to the Texas Court of Criminal Appeals. The Appeals Court reversed his conviction, finding that there was insufficient evidence to establish ownership and control of the money the indictment had charged Carter with embezzling. The case was remanded to the trial court and Carter filed a "Special Plea" claiming that double jeopardy barred his retrial. The trial court did not specifically pass on the "Special Plea", but Carter was subsequently retried and convicted in 1974 on an identical embezzlement charge. Once again, the 1962 and 1969 felony convictions were used to enhance his sentence to life, this sentence to be served consecutively to the seven year sentence he was already serving for the 1969 coonviction.

Carter did not appeal his 1974 conviction. On December 3, 1974, he filed a habeas petition, Cause No. 74-H-1603, attacking the conviction in federal

court. After four different amendments by Carter, this petition eventually raised claims attacking the 1974, 1969, and 1962 convictions.[1]

In 1978, the Supreme Court decided *Burks v. United States*, 437 U.S. 1, 98 S.CT. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), and held that the double jeopardy clause precludes a second trial of a defendant when a prior conviction has been reversed by an appellate court for insufficiency of the evidence. This was substantially the same theory which Carter had argued four years previously in his 1974 "Special Plea" requesting that he not be retried for embezzlement. Thus, on July 19, 1978, a month after *Burks* and *Greene* were decided, Carter filed a fifth amendment to his habeas petition in No. 74-H-1603, alleging for the first time in his various habeas petitions that the double jeopardy clause invalidated his 1974 conviction.

The State of Texas moved to dismiss No. 74-H-1603, alleging Carter's failure to exhaust state remedies. The State argued that because this newest theory was never raised before in a state habeas petition or on appeal of the 1974 conviction, Carter had not exhausted the remedies available to him. Relying on this circuit's en banc decision in *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978), the State argued that No. 74-H-1603 was at best a "mixed" petition consisting of both exhausted and unexhausted claims, and, under *Galtieri*, the entire petition should be dismissed without prejudice. United States Magistrate Ronald J. Blask, in a memorandum and recommendation signed August 18, 1978, recommended that the motion to dismiss be granted. On August 21, 1978, District Judge Finis E. Cowan adopted the recommendation and dismissed No. 74-H-1603 for failure to exhaust state remedies.

At this point events took a complicated and unusual turn. On August 31, 1978, Carter filed a motion for

reconsideration of the court's decision, requesting that the dismissal order be vacated. Carter argued that his petition in No. 74-H-1603 attacked both his 1969 embezzlement conviction and his 1974 embezzlement conviction. He claimed that he had fully exhausted his state remedies as to the former and that his double jeopardy claim under *Burks, supra,* and *Greene, supra,* applied only to the latter. He argued, moreover, that dismissal of No. 74-H-1603 in its entirety would prevent him from obtaining any federal habeas corpus review of his 1969 conviction. Carter had filed No. 74-H-1603 on December 3, 1974, some five months before he had fully discharged the seven-year sentence associated with the 1969 conviction. Because of that, federal habeas corpus jurisdiction over No. 74-H-1603 continued to exist under *Carafas v. LaVallee,* 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), even after May 17, 1975, when service of the seven-year sentence was completed. It would not, however, Carter contended, extend to any federal habeas corpus action filed after May 17, 1975, even if that action had originally been filed in federal court prior to that date and had been dismissed for failure to exhaust state remedies. If justice was to be done, Carter insisted, No. 74-H-1603 could not be dismissed in its entirety.

The matter was once again referred to Magistrate Blask, who issued a second memorandum and recommendation. In this second memorandum, dated January 9, 1979, the magistrate characterized No. 74-H-1603 as a mixed petition with the 1969 claims exhausted and the 1974 claims only partially exhausted. The magistrate then discussed the application of the exhaustion requirement laid out in *Galtieri v. Wainwright, supra,* to petitioner Carter's case:

> The *Galtieri* rule is premised upon the principle that "requiring exhaustion of all claims does not 'bar the federal courthouse door' to any petitioner." *Galtieri*

v. Wainwright, supra, at 355. Carter's seven year challenge will, in my judgment, be barred if, as the respondent suggest, the entire petition should be dismissed. Furthermore, ... this petition raises the problem of the appropriate resolution to be made where two distinct convictions arising in two separate state courts in this County are challenged in the same action in federal court... [I]n order to avoid the harsh consequences engendered by dismissal of petitioner's viable seven year challenge and yet satisfy the demands of the exhaustion doctrine as to the issues raised in the life sentence case, it is Recommended that the Court's Order and Final Judgment dated August 21, 1978, be modified as follows:

1. This cause of action be severed and designated as C.A. No. 74-H-1603-A, incorporating petitioner's independent challenge to his 1969 seven year embezzlement conviction in Cause No. 137,784 in the 174th Judicial District Court of Harris County, Texas, and C.A. No. 74-h-1603-B, encompassing petitioner's independent challenge to his 1974 life sentence imposed in Cause No. 178,126 in the 185th Judicial District Court of Harris County, Texas;

2. As the court has previously adopted the Memorandum and Recommendation of the undersigned that the life sentence (C.A. No. 74-H-1603-B) contains both exhausted and unexhausted claims, said action be dismissed, without prejudice, for failure to exhaust all available state remedies as required by law, and

3. Petitioner's seven year challenge (C.A. No. 74-H-1603-A) be retained on the court's docket awaiting final disposition of the claims raised therein.

On February 8, 1979, Judge Cowan followed this recommendation, adopting Magistrate Blask's Memorandum and Recommendation and splitting No. 74-H-1603 into two actions.

Carter did not wait for the February 8 severance by the district court. Instead, after the August 21 order dismissing the case, he filed a second state habeas challenge to his 1974 conviction in state court, No. 178,126-B, on September 21, 1978, in the 185th District Court of Harris County, Texas.[2] The district court dismissed, finding it had no jurisdiction. On January 10, 1979, the Texas Court of Criminal Appeals dismissed, explaining:

> In this Court, Carter argues that the order entered by the trial court was incorrect; and, that because of a recent amendment to Article 11.07, Vernon's Ann.C.C.P., the trial court erroneously concluded that it did not have jurisdiction of this proceeding. We need not reach Carter's contentions, however, because he admits under oath that he is presently challenging the validity of his conviction in Cause Number 178,126, by federal habeas corpus proceedings. Out of deference to the federal courts, we will not exercise our habeas corpus jurisdiction until Carter's attack on the validity of his conviction in Cause Number 178,126, has been finally concluded in the federal courts.
>
> Therefore, the instant proceeding is dismissed without prejudice to Carter's reapplying to the trial court for habeas corpus relief pursuant to Article 11.07, supra, when his challenge to the validity of his conviction in Cause No. 178,126 has been finally concluded in the federal courts.

On March 9, one month after Judge Cowan ordered No. 74-H-1603 severed, Carter brought a third state habeas corpus action in Harris County District

Court. In this petition, No. 178,126-C, Carter alleged that his 1974 conviction was barred by double jeopardy, and reasserted his other claims in No. 178,126-B. He requested that the court proceed to the double jeopardy claim first, since it would not require an evidentiary hearing. He included a copy of Judge Cowan's Order of February 8, 1979, and gave an explanation of how the district court had dealt with No. 74-H-1603. This third state habeas petition was eventually dismissed by the Texas Court of Criminal Appeals on November 14, 1979. The Court of Criminal Appeals explained its reasons as follows:

> In his present application, petitioner admits that he has an application for writ of habeas corpus pending in the United States District Court for the Southern District of Texas, Houston Division, in an action styled *Albert H. Carter v. W.J. Estelle, Jr.*, Civil Action No. 74-H-1603.
>
> In *Ex parte Green*, 548 S.W.2d 914 (Tex. Cr.App.1977), this Court stated: "A petitioner must decide which form [sic] he will proceed in because this Court will not and the trial court in this State should not consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter. *Ex parte Powers*, 487 S.W.2d 101 (Tex.Cr.App.1972)." See also *Ex parte McNeil*, 588 S.W.2d 592 (Tex.Cr.App.1979).
>
> Petitioner's application for writ of habeas corpus is dismissed without prejudice to his right to reapply to the trial court for habeas corpus relief pursuant to Article 11.07, supra, when his challenge to the validity of his conviction has been finally concluded in the federal courts.

Carter moved for reconsideration of the dismissal order, explaining in a letter that his claims in the present

state habeas proceeding dealt with the 1974 conviction, not with the 1969 conviction, which was the subject of No. 74-H-1603-A:

> This Court dismissed this action without prejudice solely because of a gross misunderstanding by this Court of a single fact. In the second paragraph of [its] dismissal order, this Court stated that "petitioner admits" that he has a federal habeas corpus action pending. That much is true, but the pending federal action (No. 74-H-1603-[A]) does *not* attack petitioner's *present* conviction (i.e., Cause No. 178,126 in the state District Court). Rather, the federal habeas action attacks *only* Petitioner's prior convictions (including a federal conviction and three misdemeanor convictions) which resulted in penal sentences which Petitioner fully discharged many years ago—and as to which the federal court has formally determined that Petitioner has fully exhausted state remedies.

On January 14, 1980, the Texas Court of Criminal Appeals denied the Motion for Reconsideration without written order.

Carter now returned to the federal courts and filed the present action, No. H-80-433, on February 29, 1980, once again attacking his 1974 conviction. Carter now alleged as his sole ground for relief his double jeopardy claim; he stated in his petition that he had "more than 30 additional grounds for relief" but that he would not assert them to avoid "unduly burdening the Court."

The State of Texas once again moved to dismiss for failure to exhaust state remedies. A hearing was held before Judge Gabrielle McDonald on July 13, 1980. At the conclusion of argument, the district court orally denied the State's motion for dismissal, granted summary judgment to Carter, and ordered him released immediately.

On July 17, 1980, the court issued an opinion explaining the reason for its decision. It argued that the Texas Court's refusal to hear Carter's petition should not put Carter to the unpleasant choice of dismissing the federal action in No. 74-H-1603-A and losing the ability to attack his 1969 conviction forever, or instead remaining incarcerated until the federal courts heard No. 74-H-1603-A and Carter could then refile in state court. The court held that the actions of the Texas Court of Criminal Appeals were sufficient for exhaustion purposes. It relied in part on its assessment that the Texas courts had dismissed the petition due to a misunderstanding of the facts of the case:

> [T]he failure of the Texas Court of Criminal Appeals to exercise habeas corpus jurisdiction over the present claim is, almost without question, attributable to a factual misunderstanding, a misunderstanding which the petitioner has made every effort to correct. The cases which the Texas Court of Criminal Appeals relied upon in refusing to entertain petitioner Carter's application for writ of habeas corpus firmly establish that the state courts will not accept habeas corpus jurisdiction of a case if the same case is being litigated in federal court.... That was not the case with the application that petitioner Carter had pending in federal court. As Magistrate Blask and Judge Cowan correctly determined, the petition before the Texas Court of Criminal Appeals and the petition pending in federal court involved, "two distinct convictions arising in two separate state courts." ....The Court of Criminal Appeals, it can be seen, failed to understand the facts. That is unfortunate, to say the least, but it is not the petitioner's fault.... It cannot, moreover, prevent this Court from reviewing the petitioner's claim. *See Smith v. Digmon*, 434 U.S. 332, 98 S.Ct. 597, 54 L.Ed.2d 582 (1978); *Carr v. Alabama*, 586 F.2d 462 (5th Cir. 1978).

499 F.Supp. 777 at 781-82.

The District Court considered but rejected the possibility that the Texas Courts were applying a rule of justiciability or comity requiring prior "exhaustion" of federal remedies which might conceivably moot or otherwise affect the state habeas case.

> [I]t is conceivable that the Texas Court of Criminal Appeals did not misunderstand the facts in regard to the petitioner's habeas corpus cases, but, instead, by refusing to entertain the petitioner's claim, intended to adopt a new rule: that state habeas corpus jurisdiction would not extend to a challenge to one conviction when the petitioner had a challenge to another conviction pending in federal court, at least when the latter conviction was used to enhance the sentence given for the former conviction. Such a rule, would, however, be a substantial departure from the current rule followed by the Texas courts... It would, moreover, severely impair the flow of multiple offenders' habeas corpus cases through the state and federal systems. In order to obtain state habeas corpus review of convictions obtained after the original filing of a habeas corpus action in federal court, the petitioner would, presumably, repeatedly have to dismiss and refile his federal habeas corpus case. The delay and disruption would be staggering. Finally, as petitioner Carter's case aptly demonstrates, such a rule would, if respected by the federal courts, "bar the federal courthouse door," *Galtieri v. Wainwright, supra,* at 355, to many claims. *This Court cannot believe that the Texas Court of Criminal Appeals would have adopted such a rule without explicitly saying so. It need not decide, therefore, whether if such a rule had been adopted, dismissal for failure to exhaust state remedies would be required.*

499 F.Supp. at 782-83 (emphasis added).

The State of Texas filed a timely appeal to this court. However, in a still further procedural wrinkle on this case, the State sought and obtained a stay in the proceedings in No. 74-H-1603-A pending the outcome of the present appeal.[3]

On appeal we are presented with two questions: whether Carter's double jeopardy claim was properly exhausted and thus properly before the district court, and if so, whether the district court's assessment of Carter's double jeopardy claim was correct as a matter of law. The latter is more or less a straightforward question involving application of *Burks* and *Greene*, as we discuss *infra*. The exhaustion issue presents a threshold question of some difficulty, however. This problem is complicated by the procedural tangles which have marked this litigation from its inception. It is further complicated by the summary and ambiguous actions of the Texas Court of Criminal Appeals. Our analysis of the exhaustion issue will proceed in five stages. First we discuss the doctrinal history of the Texas rule of habeas abstention used by the Court of Criminal Appeals in this case. Second, we examine the Texas scheme's adequacy and effectiveness for the prompt resolution of habeas claims in general and the claim involved in this case in particular. Third, we discuss the exhaustion requirement and its theoretical underpinnings. Fourth, we demonstrate how the judicially developed exceptions to the rule of exhaustion all derive from the same theoretical framework as the rule itself. Fifth, we apply that framework to the Texas rule as we understand it to operate in this case.

II. THE DEVELOPMENT OF THE TEXAS RULE OF HABEAS ABSTENTION.

The District Court based its decision upon the assumption that the Texas Court of Criminal Appeals had misunderstood the severance procedure instituted by Judge Cowan. The district court held that the Court

of Criminal Appeals mistakenly thought that No. 74-H-1603-A, which remained in the federal courts, contained a challenge to the 1974 conviction because No. 74-H-1603 had contained such a challenge. We must begin our analysis, however, with a rejection of the district court's assumption. The record shows that the Court of Criminal Appeals was provided with a complete explanation of Judge Cowan's decision by Carter and that Judge Cowan's order itself was submitted to the Court of Criminal Appeals along with Carter's habeas petition in No. 178,126-C. Thus, we cannot assume that the Court of Criminal Appeals was ignorant of or misunderstood the relevant circumstances of the case.

Rather, we must take the Court of Criminal Appeals decisions in No. 178,126-B and No. 178,126-C at face value. These opinions, the relevant language of which appears above, dismissed Carter's habeas petitions on the basis of three Texas cases, *Ex parte Powers*, 487 S.W.2d 101 (Tex.Cr.App. 1972), *Ex parte Green*, 548 S.W.2d 914 (Tex.Cr.App.1977), and *Ex parte McNeil*, 588 S.W.2d 592 (Tex.Cr.App.1979). These cases developed a doctrine of state habeas abstention which we now examine in detail.

In *Ex parte Powers*, the Court of Criminal Appeals announced what appeared to be a new rule of judicial deference to ongoing federal criminal proceedings:

> This application for writ of habeas corpus was dismissed on May 3, 1972, for the reason that both the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Western District of Texas had retained jurisdiction of this case, holding it in abeyance in habeas corpus matters pending before them. This court declined to consider the petitioner's application so long as those courts retained jurisdiction.

> Appropriate orders have now been entered by both the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Western District of Texas, dismissing all matters pertaining to this case.
>
> We will now consider the application for writ of habeas corpus.

487 S.W.2d at 102. This rule was utilized again in *Ex parte Green.* In that case, the petitioner had filed a writ of habeas corpus in state district court, had it dismissed, and then filed in federal district court. The federal court dismissed, and an appeal was taken to the Fifth Circuit. While the appeal was pending, there was an intervening Supreme Court Decision, *Menna v. New York,* 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), which was relevant to the petitioner's claim. The Fifth Circuit remanded in the light of *Menna,* and the district court dismissed the petition without prejudice in order to allow the state courts an opportunity to address the question first. At this point, the petitioner filed an appeal to the Fifth Circuit and filed a new habeas petition in a state district court. Relying on *Ex parte Powers,* the Court of Criminal Appeals held that consideration by the state courts should be withheld until the federal courts relinquished jurisdiction:

> Further delay was caused by prosecuting an appeal to the Fifth Circuit from the federal court order at the same time Petitioner proceeded on his application for writ of habeas corpus in the courts of this State. A petitioner must decide which forum he will proceed in, because this Court will not, and a trial court in this State should not, consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter. *Ex parte Powers,* 487 S.W.2d 101 (Tex.Cr.App.1972). The Fifth Circuit Court of Appeals has now dismissed

> Petitioner's appeal from the federal district court order; therefore, we will now consider Petitioner's application on its merits.

548 S.W.2d at 916. The language of *Powers* and *Green* had not clearly indicated whether the proper procedure was for the state court merely to hold the petition in abeyance pending the outcome of federal proceedings, or to dismiss it outright. This ambiguity was resolved in *Ex parte McNeil*:

> The petitioner now has pending in the United States District Court for the Southern District of Texas in civil Action No. H-79-393 styled John Alvin McNeil, Petitioner v. W.J. Estelle, Jr., Director, Texas Department of Corrections, Respondent, an application for writ of habeas corpus seeking the same relief that he seeks here. Since that court has entertained and retained jurisdiction of the matter we dismiss this application as we did in *Ex parte Powers*, 487 S.W.2d 101 (Tex.Cr.App.1972) and *Ex parte Green*, 548 S.W.2d 914 (Tex.Cr.App.1977). See also *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978).

588 S.W.2d at 592-93. Together, *Powers*, *Green*, and *McNeil* stand for the proposition that whenever a petitioner seeks a writ of habeas corpus in state court, if the state court determines that a federal habeas proceeding concerning the "same matter" or seeking the same relief is presently pending, the state court may not consider the merits of the petition but must dismiss it.

The question arises whether this rule of state habeas abstention is grounded upon notions of federal-state comity or on the underlying jurisdiction of the Texas courts. The Texas courts have construed their jurisdictional powers very narrowly in other circumstances, and have, in certain civil matters, refused on state constitutional grounds to decide the merits of a case while a

federal court retains jurisdiction over the same case. *United Services Life Ins. Co. v. Delaney*, 396 S.W.2d 855 (Tex.1965); *see Moore v. El Paso County*, 660 F.2d 586 (5th Cir. 1981); *Palmer v. Jackson*, 617 F.2d 424 (5th Cir. 1980); *Romero v. Coldwell*, 455 F.2d 1163 (5th Cir. 1972); *Barrett v. Atlantic Richfield Co.*, 444F.2d 38 (5th Cir. 1971) (Texas courts would not decide state law issues in *Pullman-type* situation while federal court retained jurisdiction). One panel of this court has intimated that the rule of *Ex parte Green* has a similar origin in the Texas courts' restricted interpretation of their own constitutionally granted jurisdiction. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1025 n.4 (5th Cir. 1981).

However, the language actually used by the Court of Criminal Appeals in its cases dealing with habeas abstention suggests that the doctrine is based on comity and not lack of jurisdictional power. The three reported Texas cases speak of the Texas courts as "declin[ing] to consider the petitioner's application," *Ex parte Powers, supra*, at 102, and hold that the Court of Criminal Appeals "will not, and a trial court in this State should not" consider applications when federal proceedings are pending. *Ex parte Green, supra*, at 916. Moreover, the Court of Criminal Appeals, in dismissing Carter's petition in No. 178,126-B, has justified its action "out of deference to the federal courts."

A further reason to suspect that the abstention is based on comity and not jurisdiction is that it has only been applied so far in the context of state habeas petitions. If the practice were based upon a true lack of jurisdiction, then a criminal defendant directly appealing a conviction who attacked prior convictions used for enhancement would equally be forced to forego his appeal until his federal habeas attacks on those prior convictions were dismissed or fully litigated. Such a rule would obviously have deleterious effects on a criminal defendant's right of appeal in Texas, and we have found

no Texas case where the abstention rule is invoked under these circumstances. Hence we conclude that the rule is one of comity specifically fashioned for use in the habeas context, and not a rule stemming from an inherent lack of jurisdictional power.[4]

What had not been made clear by the three reported Texas decisions is exactly what constitutes the "same matter" pending in federal and state courts which would require state abstention. The brief opinions given by the Court of Criminal Appeals in Nos. 178,126-B and C clarify the meaning of that term to some extent; but in so doing they also broadly expand the scope of the habeas abstention doctrine. It is the application of this expanded doctrine for the first time to Carter's petitions which creates the procedural problems in this case.

We can understand the gloss which the Texas courts have given to the term "same matter" by a careful examination of Carter's habeas petitions in state and federal courts. After Judge Cowan had initially dismissed No. 74-H-1603, but while the motion for reconsideration was still pending, Carter had filed habeas petition No. 178,126-B in state court, attacking his 1974 conviction. The Court of Criminal Appeals, noting that an attack on the 1974 conviction was still pending in federal court, dismissed and stated that "[o]ut of deference to the federal courts we will not exercise our habeas corpus jurisdiction until Carter's attack on the validity of his 1974 conviction in Cause No. 178,126, has been finally concluded in the federal courts." Given that 74-H-1603 contained an attack on the 1974 conviction, and sought the same relief as the state petition, this decision seems in accord with the rule of *Powers, Green,* and *McNeil.*

However, after the severance of the federal petition into 74-H-1603-A and B, and the dismissal of the latter, Carter filed his third state habeas challenge to the 1974 conviction, No. 178,126-C. The first ground for relief asserted in this petition and the one which Carter stress-

ed (as it did not require an evidentiary hearing), was double jeopardy. But No. 178,126-C contained considerably more in terms of substantive claims:

> In addition to the double jeopardy ground for relief, Petitioner hereby asserts all grounds for relief set out on pp. A-1 to A-5, inclusive, of the Appendix A to his First Supplemental Petition for Writ of Habeas Corups, filed on September 25, 1978 in this cause (as No. 178,126-B), which are herein incorporated by reference.

Pages A-1 through A-5 of the First Supplemental Petition to No. 178,126-B list twenty-six different challenges to the 1974 conviction. Of particular importance, however, is Ground for Relief III on page A-1:

> III. Petitioner's punishment was enhanced under Texas Penal Code Article 63 (1925) by evidence of a prior state embezzlement conviction (No. 137,784, 174th District Court of Harris County, Texas) and of a prior federal perjury conviction (No. 2158, United States District Court, Middle District of Georgia, Albany Division), which convictions are constitutionally invalid for the reasons hereinafter described. See pp. B-1-B-6, *post.*

Pags B-1 through B-6, in turn, list eleven major challenges to the 1969 conviction. One of these is the constitutional invalidity of the 1962 conviction, for which nine separate reasons are given.

In sum, Carter's habeas petition in No. 178,126-C contains constitutional challenges to his 1974, 1969, and 1962 convictions. Although after severence, No. 74-H-1603-A no longer challenged the 1974 conviction,it did still attack the 1969 and 1962 convictions.[5] Thus, the federal court action challenged the 1969 and 1962 convictions while the state court action challenged these two convictions plus the 1974 conviction. Under these

circumstances, the Texas Court of Criminal Appeals dismissed Carter's habeas petition, holding that the "same matters" were pending in federal and state court.

Given this action by the Texas Court of Criminal Appeals, we conclude that by "same matter" is meant "same conviction," for in both state and federal court Carter was attacking his 1969 and 1962 convictions.[6]

An alternative hypothesis, that "same matter" means instead the same substantive claim against a particular conviction, must be rejected on the facts of this case. For nothing in the record indicates that the Texas Court of Criminal Appeals knew anything about the nature of Carter's attack on the 1969 and 1962 convictions in federal court other than that these convictions were in fact being attacked on some grounds. We have examined Carter's habeas petitions in state court carefully and find no reference to the nature of the claims being raised in federal court. Moreover, we have carefully compared the claims raised in Carter's habeas petitions in No. 74-H-1603 with those raised in his state habeas petition in No. 178,126-B (which were incorporated into the petition in No. 178,126-C), and we find that the state petition raises new claims attacking the 1969 and 1962 convictions not found in Carter's petitions in No. 74-H-1603. Since the Texas courts could not know which, if any, of the state and federal claims were identical, we must conclude that the identity of the claims raised in federal and state court is apparently irrelevant for the purposes of *Ex parte Green:* it is enough that both pending actions deal with the "same matter," i.e., the 1969 and 1962 convictions.

However, if "same matter" refers to "same conviction", one might well ask why the Court of Criminal Appeals dismissed the attack on the 1974 conviction as well as the attacks on the 1969 and 1962 convictions, for only the latter two constituted the "same matter". Apparently, what Texas has done is adopt a rule analogous

to that of this circuit in *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978), that where a federal petition contains a mixture of exhausted and unexhausted claims, the entire petition will be dismissed, including the exhausted claims. (The Supreme Court has recently decided in favor of a "total exhaustion" rule of this type in *Rose v. Lundy*, ____U.S.____, 101 S.Ct. 1198, 71 L.Ed.2d 379 (1982).) The analogy to *Galtieri* is that where a state habeas petition contains some claims pending in federal court, the whole petition will be dismissed. We are strengthened in this conclusion by the fact that the Court of Criminal Appeals' opinion in *Ex parte McNeil* specifically refers to *Galtieri* for support.

The decision by the Texas courts to dismiss all claims when only some of them attack the same convictions as are pending in federal court may be based on a familiar rationale in the law of habeas corpus: The avoidance of piecemeal litigation. The State of Texas has previously expressed the desire that habeas petitioners, insofar as it is reasonably possible, bring all of their claims at one time to the Texas courts for determination. *See, e.g., Ex parte Carr*, 511 S.W.2d 523 (Tex.Cr.App.1974). The desire that habeas claims, where possible, be brought together in one proceeding underlies this circuit's en banc decision in *Galtieri v. Wainwright, supra*, and the Supreme Court's recent pronouncement in *Rose v. Lundy, supra*, for the reasons described in those opinions. Some of Carter's claims attack the 1974 conviction via an attack on the enhancing 1969 and 1962 convictions, while others attack the 1974 conviction by itself without reference to the earlier convictions. If the Texas courts dismiss only the former sorts of claims and retain and pass upon the latter, they will be creating the very sort of piecemeal litigation they desire to avoid.

There is a further but related reason why the Court of Criminal Appeals may have dismissed all of Carter's claims. The determination of the validity of the 1969 and 1962 convictions in federal court may have a signifi-

cant impact on the validity of the 1974 sentence in state court. If one of the two prior convictions is held invalid in federal court, the sentence in the 1974 conviction will automatically "unravel," because the prior convictions were used to enhance that sentence. Thus if conservation of judicial resources is the desideratum, postponement of hearing any claims attacking the 1974 sentence may be desirable since resolution of the claims pending in federal court may place Carter's state claims in a considerably different posture.

Whatever the reasons for the extension of the habeas abstention doctrine of *Ex parte Green* to Carter's case, the result is that because some of Carter's challenges to the 1974 conviction are based upon attacks on convictions currently being challenged in federal court, no attack on the 1974 conviction may proceed in state court. Because the effect of the Texas rule is central to our disposition of this case, we now examine the consequences which flow from that rule in some depth.

III. THE CONSEQUENCES OF HABEAS ABSTENTION.

Our analysis of Texas case law has led us to the following general rule: Assume that a petitioner has been convicted of a felony A, and this conviction A is later used to enhance the sentence in a subsequent conviction for felony B. Assume further that the petitioner raises a claim or set of claims (call it "A1") attacking his conviction A in the state courts, whether by direct appeal or state collateral review procedures. If his claim is exhausted in the state courts, it may be heard through a habeas petition in the federal courts. *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). Assume that A1 is thus pending in the federal courts. In the meantime, petitioner has been tried and convicted of felony B. He now raises in a state habeas proceeding claims B1 and B2, attacking conviction B. B1 is an attack on B which makes no reference to and

does not depend on the validity of A. B2, on the other hand, is an attack on B on the grounds that A, the conviction used to enhance B, is invalid. The rule which the Texas courts appear to have adopted here is that if B1 and B2 are now raised in state court, and an attack on A is pending in federal court, the "same matter" is pending for purposes of *Ex parte Green*, and the state court will refuse to hear *both* B1 and B2. This is true even though the attack on A in B2 may not be identical to that in A1,[7] and even though B1 contains no attack on A at all. Apparently, the fact that any challenge to A exists in both state and federal courts is enough to prevent the Texas courts from hearing the entire petition.

This rule is not without difficult consequences for a petitioner who seeks to present claims involving successive convictions in an efficient and orderly fashion. Again assume that A1 has just been exhausted and has just been filed in federal court. The petitioner now seeks to attack the new conviction B on the basis of claims B1 and B2. He may not bring B1 and B2 directly to the federal court because they are not exhausted. But he cannot bring them in a habeas petition in state court to exhaust them, for then state and federal courts would be passing on the "same matter" (B2 and A1) under the meaning of the Texas rule and so both B1 and B2 would be dismissed. This means that he must either dismiss A1 in federal court or wait until that claim is completely exhausted in the federal courts before he may begin the entire process of exhaustion over again in the state courts with B1 and B2.

Of course, it may be objected that the simpler and better solution is simply to dismiss A1 and exhaust B1 and B2 first. But this, too, has its problems. If any of the grounds in A1 are particularly meritorious, it seems unfair to require the petitioner to remain incarcerated so that B1 and B2 may be tested in the state courts first. This is especially so if B1 and B2 are novel or

uncertain claims. The petitioner is then put to a strategic choice which is at odds with the fundamental purposes of the Great Writ—to have meritorious claims heard and vindicated and illegal incarceration ended with swift dispatch. Moreover, whichever path petitioner chooses—holding off the former claim until the latter claims are exhausted or the latter until the former is passed on in the federal courts—there is the very real danger that the delayed claim or claims will become stale and difficult of proof with the passage of time. Witnesses may die unexpectedly, memories may fade or cloud, and evidence may be lost, damaged, or destroyed. It is always true that these dangers are inherent whenever litigation is protracted. But it is clear that they would be greatly aggravated here because each set of new claims may not be pursued immediately as it arises. This defeats an orderly and efficient presentation of claims through the state and federal systems.

That is not the worst of it. Our underlying assumption up until now has been that the collateral attack on the petitioner's new conviction B is begun before proceedings of any substnce with respect to A1 occur in federal court. But there is no reason to believe that every case will be so fortuitous in its timing. Indeed, it is equally likely that the habeas attack on B would begin during an evidentiary hearing on A1, or after its completion, or on appeal to this court, or even during the pendency of a petition for certiorari to the Supreme Court. If the petitioner is well into the middle of federal consideration of his prior claims, a tremendous waste of judicial resources is expended by forcing him to dismiss his earlier claims until the later ones can "catch up" with them. And if the choice is made the other way, and the attack on B set asside instead, federal consideration of A1 may drag on for years. Either way, the petitioner, trapped in a procedural snarl of epic proportions, is caught in the middle. He remains in jail, and the purposes of the Great Writ are twisted beyond recognition.

The problems just described are a result of the time delay between the filing of A1 and the filing of the habeas attack on B in state court. When one is dealing with multiple convictions, a time lag between attacks on earlier and later convictions will almost always exist of necessity. Indeed, under Texas law A cannot even be used for enhancement of B to a life sentence unless A has become final prior to the commission of the offense which is the subject of conviction B. *E.g. Carter v. State,* 510 S.W.2d 323 (Tex.Cr.App.1974); *Rummel v. Estelle,* 587 F.2d 651, 656 (5th Cir. 1978); *aff'd,* 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (both discussing predecessor to present enhancement statute Tex.Pen.Code Ann. § 12.42 (West)). Given this fact, a time lag between the filing of a habeas attack on A and on B is virtually certain; consequently the probability is considerable that petitioners attacking multiple convictions will be ensnared in the difficulties caused by the time lag and Texas habeas law.

This is precisely the situation in which Carter now finds himself. The Texas courts have told him that no attack on the 1974 conviction is possible while attacks on the 1969 and 1962 convictions are pending in federal court. Carter now applies to the federal courts, seeking to extricate himself from the procedural tangle the habeas abstention rule has created. That tangle exists because Carter must begin his collateral attack in the state courts; the reason he may not bring his 1974 claim to federal court to begin with is because he is required to exhaust available state remedies first. Carter comes to us now and states that he has presented his double jeopardy claim to the state courts and that they have rejected consideration of it because of the habeas abstention rule. He asks that we consider his claim exhausted, which would free him from the Hobson's choice the habeas abstention rule would otherwise put him to. The State of Texas argues that the Court of Criminal Appeals has never passed on the claim because of the very

same habeas abstention rule; thus the State argues that Carter's double jeopardy claim cannot be said to be exhausted.

The question before us is simple to state but difficult to resolve: has Carter exhausted his state remedies? Mechanical applications of prior exhaustion doctrine will not answer this question for us, for Texas presents us with a unique procedural situation. Instead we must focus on the purposes underlying exhaustion doctrine and consider what result is most in harmony with those purposes. This we now proceed to do.

IV. THE BASIC FRAMEWORK OF EXHAUSTION DOCTRINE: COMITY AND COMPROMISE.

The seminal case on the requirement of exhaustion is *Ex parte Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886). In that case, the petitioner claimed that the Virginia statute he had allegedly violated was unconstitutional and sought federal habeas relief while he was still awaiting trial. The federal circuit court dismissed the writ and the Supreme Court affirmed. In so doing, it stated the two principles upon which exhaustion doctrine rests. The first principle is that the federal courts always possess the power to grant the writ without exhaustion due to the federal judiciary's basic purpose and duty of protecting and vindicating federal constitutional rights.[8] The second principle is that as a matter of judicial discretion, federal courts should allow the state courts the first opportunity to vindicate these federal constitutional rights; in this way, due respect for state institutions will be given and needless federal-state interference avoided. 117 U.S. at 251, 6 S.Ct. at 740.

The exhaustion requirement was the response to an inevitable tension between state and federal interests created by the historical importance of the Great Writ in Anglo-American law and the system of dual sovereignty

at the heart of the American Constitution. The federal interest was in a sure and speedy method of remedying unconstitutional incarceration—for this was the very purpose of the Great Writ—and since 1867, the federal courts had been empowered to exercise that remedy with respect to state convictions. The state interest, on the other hand, was in an orderly functioning of its own judicial processes without needless interference by the federal government.

> As it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity for the state court to correct a constitutional violation, the federal courts sought a means to avoid such collisions. Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its juridiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

Darr v. Burford, 339 U.S. 200, 204, 70 S.Ct. 587, 590, 94 L.Ed. 761 (1950)(footnote omitted).

The comity spoken of in *Darr v. Burford* necessarily involves a balancing of both state and federal interests, of orderly state judicial administration and speedy vindication of constitutional rights.[9] The exhaustion doctrine is a compromise which reflects the interests and needs of both federal and state systems. The principle of comity means that the federal courts are not usually able to grant an immediate remedy given the requirement of exhaustion. On the other hand, the state judicial process can hear a petitioner's constitutional claims immediately and indeed has a duty to pass on them every bit as great as the federal courts have.

In sum, the notion of comity which underlies the exhaustion doctrine must be understood not as a capitula-

tion of federal power to state interests; rather, comity involves a delicate balance and compromise of both state and federal concerns.[10] For as much as the unchanneled exercise of habeas corpus by the federal courts would disrupt the integrity of the state criminal process, so too would an unthinking subservience to state sovereignty render the time-honored Writ of Liberty sterile and nugatory. Comity requires sensitive accommodation, and not simply slavish adherence, to the interst of the states.

V. EXHAUSTION AS FAIR OPPORTUNITY.

The basic compromise which underlies all of exhaustion doctrine require that the state courts be given the first opportunity to pass upon the petitioner's federal claims. *Picard v. Connor*, 404 U.S. 270, 275-276, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). Exhaustion normally "requires only that the federal claim have been fairly presented to the highest court of the State, either on direct review of the conviction or in a post-conviction attack." *Escobedo v. Estelle*, 650 F.2d 70, 72 (5th Cir.), *modified on petition for rehearing*, 655 F.2d 613 (1981); *Ogle v. Estelle*, 592 F.2d 1264, 1267 (5th Cir. 1979); *Galtieri, supra*, at 353-54. Thus, if the substance of the petitioner's claims is brought to the state court's attention, the fact that the court does not explicitly pass on the claims is irrelevant to the question of exhaustion, because the opportunity to consider them has been presented. *Smith v. Digmon*, 434 U.S. 332, 333-34, 98 S.Ct. 597, 598-599, 54 L.Ed.2d 582 (1978)(per curiam); *Francisco v. Gathright*, 419 U.S. 59, 60, 95 S.Ct. 257, 258, 42 L.Ed.2d 226 (1974)(claim was exhausted even though Virginia Supreme Court declined to review petitioner's conviction on direct appeal and affirmed by order); *Escobedo v. Estelle, supra*, at 75 (dismissal by Texas Court of Criminal Appeals without opinion satisfied exhaustion requirement); *Carr v. Alabama*, 586 F.2d 462 (5th Cir. 1978).

As a matter of comity the petitioner will usually be required to follow the normal appellate or post-conviction procedural routes for raising his claim in the state's highest court; the use of extraordinary writs or other abnormal or seldom-used avenues of relief is generally not considered a proper method of exhaustion when normal methods are available.[11]

If a petitioner wishes to exhaust his claims he is expected not only to use the normal avenues of relief but also to present his claims before the courts in a procedurally proper manner according to the rules of the state courts. *Brown v. Estelle*, 530 F.2d 1280 (5th Cir. 1976); *Tooten v. Shevin*, 493 F.2d 173 (5th Cir. 1974), *cert. denied*, 421 U.S. 966, 95 S.Ct. 1957, 44 L.Ed.2d 454 (1975). In *Brown* we held that the petitioner's application for writ of mandamus to the Texas Supreme Court did not meet the requirements of exhaustion, not because the writ was not a proper avenue of relief in the circumstances of the case, but rather because the application was not submitted by an attorney as required by Texas law. Because there was no reason to believe that the petitioner would not be able to receive assistance of counsel so that the application could be properly made, the petitioner was required to comply with the procedural rule.

However, *Brown* made clear that the requirement that a petitioner should follow state procedual rules in exhausting his claims is not an inflexible one; "we would not permit a state procedural rule or practice to frustrate vindication of federal constitutional rights where it is unfairly applied or puts an undue burden on a petitioner." 530 F.2d at 1284. Thus with respect to the state procedural rule involved in *Brown* the court states that "[i]f petitioner is unable to obtain the assistance of counsel that the ... the Texas Supreme Court require[s] ... we will deem these state remedies exhausted." *Id.*

The compromise of interests which underlies exhaustion doctrine requires that the federal courts assure themselves that the state courts have had a fair opportunity to pass on a petitioner's claims before they assume habeas jurisdiction; however what constitutes a "fair opportunity" is not necessarity coextensive with whatever procedual requirements the state may choose to impose. That is the lesson of *Brown v. Estelle*, and we have applied this reasoning repeatedly. *E.g., Ogle v. Estelle, supra; Houston v. Estelle*, 569 F.2d 372 (5th Cir. 1978). In *Houston*, the Texas Court of Criminal Appeals had refused to pass on the merits of some of the petitioner's claims because the introductory list of grounds of error asserted in petitioner's state brief did not give specific references to the pages in the record where the alleged trial errors occurred. Because the brief thus failed to comply with the formal requirements of Tex.Code Crim.Pro.Ann. art. 40.09, § 9 (West), the Court of Criminal Appeals did not consider the claims even though page references were present in the actual argument sections of petitioner's brief and even though the State's brief in opposition was apparently perfectly able to identify and discuss the portions of the record in question. A panel of this circuit held that the petitioner had exhausted state remedies as there could be no doubt that a fair opportunity to pass on the claims was presented to the Texas courts. 569 F.2d at 375-76. The court acknowledged Texas' right to prescribe procedual rules such as the proper form of briefing, but stated that "it does not necessarily follow, however, that perfect compliance with such rules of briefing is always a prerequisite to the exercise of federal habeas corpus jurisdiction."[12] We are in full agreement. The question of whether a state has had a "fair opportunity" to consider a petitioner's constitutional claims is one for the federal courts to decide with all due respect for the integrity of state judicial processes; whether the state believes it has had an opportunity to pass upon the claims in light of its various procedual requirements is an important factor in this determination, but it is not dispositive.[13]

Brown v.Estelle spoke of the problem of state procedural rules which might unduly hinder or burden a habeas petitioner and how exhaustion doctrine must react with flexibiliy in such situations. These concerns lead us to still another aspect of exhaustion doctrine which is relevant to this case: The adequacy and effectiveness of state remedial procedures in general.

VI. ADEQUACY AND EFFECTIVENESS OF STATE PROCEDURES.

We have seen that the doctrine of exhaustion, an embodiment of the principle of comity, is the result of a delicate balancing of federal and state interests. Underlying the compromise is the assumption that although immediate access to a federal forum for speedy resolution of federal claims is not possible, the state court system will be able to address the petitioner's claims as he works his way through that system. Of course, this assumption itself rests upon a still deeper one; namely, the belief that state courts are, in good faith, equally willing and able to protect federal constitutional rights as the federal courts. Indeed, *Ex parte Royall* made that assumption explicitly when it stated that the circumstances in the cases before it did not

> suggest any reason why the State court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The Circuit Court was not at liberty, under the circumstances disclosed, to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States.

117 U.S. at 252, 6 S.Ct. at 740. Thus at the very core of exhaustion doctrine is the requirement that state procedures be adequate and effective, for it is only because these procedures are adequate to vindicate federal constitutional rights that the forbearance of the federal courts from swift consideration of habeas corpus claims is justified. If the state procedures do not provide a *bona fide* forum for a petitioner's constitutional claims or merely delay and hinder ultimate resolution, the foundations upon which exhaustion doctrine rests are dissolved. The balancing of interests which is always inherent in the doctrine of comity then tips in favor of immediate consideration of petitioner's claims through federal habeas proceedings.

The present codification of the exhaustion requirement, 28 U.S.C. § 2254(b), speaks directly to this problem. It states that exhaustion of state remedies is required unless "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." *See Rose v. Lundy*, ____U.S.____, ____n.7, 102 S.Ct. 1198, 1202 n.7, 71 L.Ed.2d 379 (1982) (exhaustion doctrine does not bar relief where state remedies are inadequate); *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) (exhaustion requirement presupposes that prisoner's state remedy must be adequate and available); *Young v. Ragen*, 337 U.S. 235, 69 S.Ct. 1073, 93 L.Ed. 1333 (1949) (same).[14]

It is because state procedures may not always be adequate or effective that courts have treated the exhaustion requirement with flexibility. In some cases where the state procedures are found wanting the courts will speak of the claims as not requiring exhaustion; in others the claims are considered "technically exhausted." *Galtieri, supra*, at 354.

The exceptions to the exhaustion doctrine illustrate the tension between the swift vindication of the petitioner's constitutional rights and the comity principles undergirding the doctrine. Whether the reason for reaching an unexhausted claim is termed a satisfaction of or an exception to the doctrine, it is clear that the federal court must weigh the conflicting interests served by the federal writ of habeas corpus and by the exhaustion doctrine before addressing the merits of an unexhausted claim. Exceptions to the exhaustion doctrine have been developed judicially to cover situations where mechanical adherence would not further the goals of the exhaustion doctrine or would frustrate an overriding federal concern.

Id. Thus, it has been held that exhaustion is not necessary where resort to state remedies would be futile[15], because the necessary delay before entrance to a federal forum which would be required is not justified where the state court's attitude towards a petitioner's claims is a foregone conclusion.[16]

The courts have also held that where the state processes cause undue delays to the hearing of petitioner's claims in special circumstances, a petitioner's claims may be treated as technically exhausted.[17] Once again, this exception makes sense in the context of the underlying compromise between swift vindication of rights which is the purpose of the Great Writ and accommodation of the somewhat slower but normal judicial processes of the state courts. Where the state processes are unduly and unreasonably delayed through no fault of the petitioner, the terms of the compromise must be reevaluated.[18]

Most important for our purposes, the exhaustion requirement has not been applied mechanically where it is shown that the state's procedures for exhaustion are so cumbersome, complex and confusing that they frustrate good faith attempts to comply with them. The classic

statement of this principle is that of Justice Rutledge concurring in *Marino v. Ragen*, 332 U.S. 561, 68 S.Ct. 240, 92 L.Ed. 170 (1947). *Marino* was one of a series of cases in which the Supreme Court attempted, with only partial success, to fathom the complexities of Illinois remedial law.[19] Justice Rutledge argued that the petitioner in *Marino* should be considered to have exhausted his remedies:

> This rule, requiring exhaustion of state remedies as a condition precedent to federal relief, has been firmly established by repeated decisions of this Court. Even in extreme situations its application has been justified by sound administrative reasons. But it has always been clear that the rule may be applied only on the assumption that an adequate state remedy is actually available.... And it would be nothing less than abdication of our constitutional duty and function to rebuff petitioners with this mechanical formula whenever it may become clear that the alleged state remedy is nothing but a procedural morass offering no substantial hope of relief. Experience has convinced me that this is true of Illinois.
>
> . . . .
>
> The trouble with Illinois is not that it offers no procedure. It is that it offers too many, and makes them so intricate and ineffective that in practical effect they amount to none. The possibility of securing effective determination on the merits is substantially foreclosed by the probability, indeed the all but mathematical certainty, that the case will go off on the procedural ruling that the wrong one of several possible remedies has been followed.
>
> . . . .

> The exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of three separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the three is appropriate or effective.
>
> . . . .
>
> The Illinois scheme affords a theoretical system of remedies. In my judgment it is hardly more than theoretical. Experience has shown beyond all doubt that, in any practical sense, the remedies available there are inadequate. Whether this is true because in fact no remedy exists, or because every remedy is so limited as to be inadequate, or because the procedural problem of selecting the proper one is so difficult, is beside the point. If the federal guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights have an adequate opportunity to be heard in court. The opportunity is not adequate so long as they are required to ride the Illinois merry-go-round of habeas corpus, coram nobis, and writ of error before getting a hearing in a federal court.
>
> Consequently, as far as I am concerned, the Illinois remedies are exhausted here....

332 U.S. at 564-69, 68 S.Ct. at 242-244 (Rutledge, J., concurring)(footnotes omitted).

Although Justice Rutledge spoke for only three justices in his concurrence to *Marino v. Ragen*, his words and his reasoning there have been continually cited with approval by the federal courts. *E.g., Wilwording v. Swenson*, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971); *Codispoti v. Howard*, 589 F.2d 135 (3rd Cir. 1978); *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978); *United States ex rel. Smith v. Jackson*, 234 F.2d 742 (2d Cir. 1956). Thus, this ciruit has stated in its en banc decision in *Galtieri supra*, that "[e]xhaustion ought not be required when the 'state procedural snarls or obstacles preclude an effective state remedy.'" 582 F.2d at 354 n.12 (quoting *Bartone v. United States*, 375 U.S. 52, 54, 84 S.Ct. 21, 22, 11 L.Ed.2d 11 (1963)).[20]

VII. HAS CARTER EXHAUSTED?

We now apply these principles to the case before us. Carter argues that he presented his double jeopardy claims in No. 178,126-C, and that this presentation gave the Texas courts an adequate and fair opportunity to pass upon these claims. The fact that the Court of Criminal Appeals dismissed the petition without reaching the merits is, he contends, of no consequence under *Smith v. Digmon*. Thus, Carter argues, he has met the requirements of exhaustion doctrine.

The State of Texas argues in response that this case involves failure to abide by proper state procedures in the manner in which Carter presented his claims; the State relies on *Brown v. Estelle* and *Tooten v. Shevin* for the proposition that this procedural defect prevents Carter from claiming that he has exhausted state remedies. It is important to understand what this argument amounts to. The State of Texas is not arguing that Carter had chosen an abnormal path in reaching the Texas Court of Criminal Appeals to present No. 178,126-C. Nor does the State argue that No. 178,126-C was not properly filed in the original convicting court and properly appealed to the Court of Criminal

Appeals. Nor does Texas argue that the form of briefing was inadequate or that Texas courts were unaware of the substantive nature of Carter's claims. Indeed the only procedural defect which the State of Texas seems to be able to point to is that Carter filed his state habeas ptition while No. 74-H-1603-A was pending in the federal courts; Carter thus became the victim of a new extension of the principles of *Ex parte Green*, hitherto unannounced, and applied for the first time in his case. Nevertheless, the State of Texas argues that whether newly developed or not, the habeas abstention doctrine prevents the Texas courts from passing upon Carter's double jeopardy claim; therefore it cannot be said that Texas has had a real opportunity to consider the claim, and hence Carter cannot be said to have exhausted it.

Yet this argument proves too much. If the result of the Texas habeas abstention rule is as the State says it is—if the Court of Criminal Appeals has absolutely no choice in the matter but may not consider Carter's double jeopardy claim on the merits—the conclusion to be drawn from this is not that Carter has not exhausted but that he had no available state remedy at the time he filed No. 178,126-C. And if his application and its subsequent dismissal proves that he has no available state remedy, he must be considered to be exhausted. 42 U.S.C. § 2254(b) and (c).

The State argues in reply to this that, on the contrary, Carter did, and still does, have an available state remedy. Carter cannot be said to have exhausted his state remedies because the Texas courts are willing to hear his claims as soon as his federal litigation is finished or dismissed. The fact that this litigation may drag on for years, or that substantial judicial resources have already been expended by the federal courts and would be wasted by a dismissal is claimed to be irrelevant. As long as the Texas courts are willing to hear Carter's claims if they are presented in a procedurally proper

fashion (i.e., with no federal claims pending), Carter cannot be said to have offered the state courts a fair opportunity to pass upon his state claims.

The State's argument is based upon a set of assumptions which we think inconsistent with the purposes of the Great Writ. Restated, the argument is that an available state remedy is not open to Carter now, but will be at some point in the future. The remedy will become available when Carter finishes his federal litigation. If Carter is unwilling to wait that long, it is his choice to dismiss his federal claims. At that point, the state will consider his attack on the 1974 conviction.

This argument begins with the idea that a state remedy which is not now available to a petitioner but will be at some point in the future requires the petitioner to wait until the remedy does become available. But this assumption has never formed a part of exhaustion doctrine. A petitioner must, of course, comply with proper state procedures in applying for *presently available* remedies offered by the state. However, the fact that a state remedy may be theoretically available at some distant point in the future does not require a petitioner to languish incarcerated until state procedures are complied with. An instructive example of this is *Peyton v. Rowe,* 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). In *Peyton,* the United States Supreme Court overturned the "prematurity" rule of *McNally v. Hill,* 293 U.S. 131, 55 S.Ct. 24, 70 L.Ed. 238 (1934), which stated that a petitioner serving the first of two consecutive sentences could not attack the second sentence on habeas corpus. After *Peyton,* it was no longer necessary for a petitioner to wait until the second sentence had officially begun before a federal court would consider him "in custody" under that sentence and thus a proper applicant for habeas corpus relief.

However, the decision in *Peyton* raised a crucial issue of exhaustion doctrine. Many states still had a similar

It may be objected that *Peyton v. Rowe* and its related cases are distinguishable upon a very important ground. In *Peyton*, the petitioner who wished to attack his second sentence in the state courts had no choice regarding how long he would have to wait before he could bring his state claim given the state's prematurity rule: That decision was made for him by the length of the first sentence he was then serving. On the other hand, Carter can have his state claims relating to his 1974 conviction heard any time he wants to: he need only dismiss his federal suit attacking the 1969 and 1962 convictions. The key to the state courthouse is in his hands, so to speak. If he does not wish to have his state claim heard immediately, that is his choice and he must bear the consequences of it.

We think this argument misses the point. The crux of the matter is whether is it legitimate for a habeas petitioner to be put to such a choice in the first place. The rule just described permits federal adjudication of the habeas claims relating to all three convictions to be held hostage to the demands of the Texas habeas system. As has been stressed before, comity and federalism require sensitive accommodation of competing interests by both the states and the national government. Each must give due respect for the other's needs and goals. Here, the state habeas rule would greatly hinder speedy federal court consideration of either Carter's 1974 conviction or his earlier convictions, depending upon the course he chooses.

We have spent a considerable amount of time earlier in this opinion explaining how the Texas habeas abstention rule creates a procedural logjam which delays potentially meritorious claims, burdens litigants who seek a federal forum for claims already dismissed by the States, acts as a snare for the unwary and wastes the judicial resources of the federal courts. All of these problems with the rule are present in this case. We think the choice which Texas seeks to put Carter to is

prematurity rule restricting access to state habeas procedures until service of the sentence under attack was properly begun. *See generally Note, Habeas Corpus and the Prematurity Rule,* 66 Colum.L.Rev. 1166-68 (1964). In a state which retained the prematurity rule, a strict view of the exhaustion requirement would still have forced the petitioner to delay his application for federal relief. This is because state remedies would eventually be available as soon as all prior sentences have been served, and federal relief was not available until state remedies were exhausted.

The Supreme Court dismissed this possible interpretation of exhaustion doctrine in *Peyton v. Rowe.* Noting that Rowe had filed an application in Virginia state court which was denied under Virginia's version of the prematurity rule, the Supreme Court described Rowe as having exhausted state remedies. 391 U.S. at 56 & n.2, 88 S.Ct. at 1550 & n.2. Similarly, other federal courts had construed exhaustion doctrine as not requiring that the petitioner comport with a state's prematurity rule before seeking relief in federal court: *Williams v. Peyton,* 372 F.2d 216 (4th Cir. 1967); *Pannell v. Peyton,* 287 F.Supp. 858 (W.D.Va. 1968); see *Via v. Peyton,* 284 F.Supp. 961 (W.D.Va.1968) (state prisoners seeking to attack future sentences have no effective remedy in the courts of Virginia, and are not requried to exhaust remedies where circumstances make remedies ineffective and futile). However, once Virginia changed its habeas corpus remedy to abolish the prematurity rule, the federal courts once again deferred to the state courts on the grounds of comity. See *Strouth v. Peyton,* 404 F.2d 537 (4th Cir. 1068) (Although at the time of filing of original habeas petition, no remedy existed in state court, abolishment of state prematurity doctrine, expansion of available remedies in state courts, doctrine of comity and fact that the petitioner presently had petition pending in state court made abstention by federal court the better course.).

untenable; it cannot be considered to present him with an adequate and effective state remedy, and exhaustion doctrine does not require us to hold otherwise. Instead, we hold that when Carter's petition No. 178,126-C was dismissed from the Texas Court of Criminal Appeals, there was at that point no available state remedy which was also an adequate remedy.[21] Thus he has met the requirements of §§ 2254(b) and (c).[22]

Our holding is limited to the facts before us, and should not be read to encourage bad faith attempts by petitioners to place themselves in procedural snarls deliberately in a attempt to bypass state consideration of their claims on the merits.[23] It seems clear to us that the expansive reading which the Texas Court of Criminal Appeals gave to its state abstention doctrine in this case could not have been predicted by Carter, and it is not reasonable to suggest that he cleverly arranged matters so as to be in the position he now finds himself in.

It is enough for us in this case to say that Carter has brought his double jeopardy claim to the state courts, the state courts have dismissed this claim (among others), and he has at present no adequate and effective state remedy available to him. Carter has exhausted the claim he has brought to us and we now consider it on the merits.

VIII. THE DOUBLE JEOPARDY CLAIM.

As we recounted at the beginning of our opinion, Carter was indicted and convicted for embezzlement in 1972. This conviction was reversed in 1974 by the Court of Criminal Appeals because of a failure by the state to prove that the owner of the embezzled funds was the same as that alleged in the indictment. *Carter v. State*, 510 S.W.2d 323 (Tex.Cr.App.1974). Carter was subsequently reindicted, tried and convicted in 1974. It is this conviction he seeks to overturn.

The factual background and the reasons for the reversal of the 1972 conviction are described concisely in the Court of Criminal Appeals' opinion in *Carter v. State;* we quote the relevant portions:

> The State's proof was that Andrew Dolce was the president of Consolidated Productions, Incorporated, a seller of plastic toys and animals, and that appellant was employed as a sales representative for that corporation, by virtue of which, so Dolce testified, appellant became his agent. Appellant's duties consisted of calling on and securing orders for the plastic items from schools and related organizations interested in selling the items in fund raising projects. Generally the orders secured were entered on an order form on which there was a prominently printed notice that all checks were to be made payable to Consolidated Productions, Inc.
>
> Some of the checks issued in payment for orders secured by appellant were made payable to and received by Consolidated Productions, Inc.; however, other checks were made payable to either the corporation and appellant or to appellant and were received by appellant. These latter checks were deposited in a bank account and withdrawn by appellant; the proceeds from these checks were not received by the corporation. The office manager of the corporation testified that all payments should have been remitted to the corporation, and that as a result of appellants's activities, the corporation sustained a loss of approximately $40,000. Andrew Dolce testified that, although appellant had authority to receive the checks in his capacity as agent and remit the money to the corporation, he did not give appellant authority or permission to convert the checks to his own use and benefit. Dolce was not asked if, and he did not testify that, he was the owner of the money alleged to have been embezzled

by appellant, or that, as president of the corporation, he had the care, control and management of such funds.

In brief, the trial court charged the jury to find appellant guilty if they found that appellant was the agent and employee of Andrew Dolce and that he did embezzle and convert to his own use without the consent of Dolce the money belonging to Dolce that had theretofore come into the possession of appellant by virtue of his employment at such agent and employee.

Having alleged ownership of the money to be in Andrew Dolce, the State was required to prove that essential allegation, *Easley v. State*, 167 Tex.Cr.R. 156, 319 S.W.2d 325 (1959), . . .

510 S.W.2d at 325-26. The Court of Criminal Appeals added that the State could, had it chosen, have requested an instruction that Dolce could be held to be a special owner of the funds and upon proof of special ownership, there would be no variance under the doctrine of *Lawhon v. State*, 429 S.W.2d 147 (Tex.Cr.App.1968), *cert. denied*, 394 U.S. 989, 89 S.Ct. 1475, 22 L.Ed.2d 764 (1969). However, the court found that not only had the State not requested a special ownership instruction, but even had the instruction been given there was insufficient evidence of special ownership.

In *Burks v. United States*, 437 U.S. 1,98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), the Supreme Court held that reversal of a conviction by an appellate court for evidentiary insufficiency creates a bar to reprosecution under the double jeopardy clause. This interpretation was applied to the states in the companion case of *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). Carter asserts that *Burks* and *Greene* apply to the reversal in *Carter v. State*, and that the subsequent 1974 conviction violated the double jeopardy clause.[24]

The ownership of the funds Carter embezzled was an essential element of the offense charged. *Carter v. State, supra.* In *Easley v. State*,167 Tex.Cr.R. 156, 319 S.W.2d 325 (1959), relied on in *Carter*, the Court of Criminal Appeals explained that "[i]t was the province of the state to so allege ownership, but in doing so it assumed the burden of establishing and proving ownership as alleged." *Id.* The Court of Criminal Appeals held that the State failed to offer evidence of the ownership as alleged. It therefore reversed. This action by the Court of Criminal Appeals was a ruling by that court "'whatever its label, [which] actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *United States v. Scott*, 437 U.S. 82, 97, 98 S.Ct. 2187, 2197, 57 L.Ed.2d 65 (1978) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1354, 51 L.Ed.2d 642 (1977) (bracketed material added in *Scott*)). Because the State failed in its proof of the ownersip of the funds, the case should never have gone to the jury. Hence, under *Burks*, the reversal is the equivalent to a directed verdict of acquittal by the trial judge. 437 U.S. at 16-18, 98 S.Ct. at 2149-2150. *Accord, Bullard v. Estelle*, 665 F.2d 1347, 1354 (5th Cir. 1982). Double jeopardy thus applies; the 1974 retrial and conviction was constitutionally impermissible.

The State of Texas attempts to avoid this conclusion by claiming that the reversal of the 1972 conviction was for trial error. Under the doctrine of *Burks*, a reversal of a conviction because of insufficiency of the evidence is to be treated as an acquittal, but there is no double jeopardy bar if the reversal is for trial error. Examples given in *Burks* of such trial errors are reversal for incorrect receipt or rejection of evidence, incorrect or prejudicial instructions and prosecutorial misconduct. 437 U.S. at 14-15 & n.8, 98 S.Ct. at 2148-2149 & n.8.

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect ...

437 U.S. at 15, 98 S.Ct. at 2149.

Texas seeks to characterize the error in Carter's 1972 trial as one not of failure of proof of an essential element but merely as failure as to the manner of proper proof. This argument is based upon an interpretation of *Compton v. State*, 607 S.W.2d 246, 249 (Tex.Cr.App.1980) (en banc) (on motion for rehearing), *cert. denied*, 450 U.S. 997, 101 S.Ct. 1701, 68 L.Ed.2d 197 (1981). In *Compton*, the defendant had been indicted for theft of $10,000.[25] The indictment alleged that the money was owned by a J. Howard Coonen. Coonen was a regional manager for International Harvester Corporation, and the proof at trial showed that the funds taken were those of International Harvester. The conviction was originally reversed by the Court of Criminal Appeals and a judgment of acquittal was entered, with the Court citing to *Burks* and *Greene*, 607 S.W.2d at 249. On rehearing, the Court of Criminal Appeals reversed its earlier decision and affirmed the conviction. It did so on the basis of a reinterpretation of the meaning of the word "owner" as generally defined in the Texas Penal Code. Under Tex.Pen.Code Ann. § 1.07(a)(24)(West), the owner of property is one who has (1) title, (2) possession, or (3) a greater right to possession than the defendant. Prior case law had held that alternative (3) only applied in cases of joint interest in the property between the "owner" and the defendant. *E.g., McGee v. State*, 572 S.W.2d 723 (Tex.Cr.App.1978). This meant that in most

cases the ownership alleged in the indictment could ony be demonstrated by showing title or possession, or else relying on a theory of special ownership. None of these demonstrated in the 1972 conviction. In *Compton*, however, the Texas Court of Criminal Appeals overruled *McGee* and held that ownership could be established by showing a greater right to possession even though there was no showing of a joint interest.

The State of Texas has not argued that because the law regarding the definition of ownership changed with *Compton*, *Compton* should be given retroactive application, that the decision in *Carter v. State* was in error, and double jeopardy should not attach. Nor would such an argument succeed. Double jeopardy barred reprosecution immediately after reversal by the appellate court, this being equivalent to an acquittal by the trial judge. As stated above the requirement for double jeopardy to attach is that there be a "resolution [in the defendant's favor], *correct or not*, of some or all of the factual elements of the offense charged." *Scott, supra*, 437 U.S. at 97, 98 S.Ct. at 2197 (quoting *Martin Linen, supra*, 430 U.S. at 571, 97 S.Ct, at 1354) (emphasis added). Thus even were the appellate court's decision based upon a wrong view of the law as understood at the time of the decision, double jeopardy would attach if the reversal were based on a perceived insufficiency of the evidence. *See Bullard v. Estelle, supra*, at 1355 n.17 (acquittal by jury, trial judge, or appellate court have all been given same effect by Supreme Court). *See also Sanabria v. United States*, 437 U.S. 54, 64, 98 S.Ct. 2170, 2178, 57 L.Ed.2d 43 (1977) (fundamental nature of the double jeopardy rule is manifested by its explicit extension to situations where an acquittal is based upon a egregiously erroneous foundation); *Scott, supra*, 437 U.S. at 98, 98 S.Ct. at 2197 (fact that acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects accuracy of determination but not its essential character as an acquittal).

Texas' argument based on *Compton* is not one of retroactivity; rather the state seeks to use *Compton* to show that the definitions of ownership in § 1.07(a)(24) go not to the element of the offense which must be alleged and proven but only to the manner of proving them. The elements remaining unchanged after *Compton,* argues the State; it is only the "manner of proof" which has been expanded. The State concluded that "manner of proof" is a problem akin to admissibility of evidence rather than evidentiary sufficiency. Since reversals based on errors of admissibility of evidence are reversals based on trial error, the argument goes, so should reversals based on "manner of proof."

We think that the State's argument is based upon a distinction without a difference. It is true that since *Compton* it is easier to prove a case of theft in a corporate context than it was previously. But the reason for this is that the substantive scope of the offense has been enlarged. As the Court in Compton made clear, it was basing its decision on the view that "the Legislature intended to *expand the class of individuals to be protected* from theft." 607 S.W.2d at 250-51. (emphasis added). "Manner of proof' is expanded only insofar as the elements of the offense are also expanded though statutory interpretation. Because the element of ownership now comprehends more potential persons who may be mentioned in the indictment, the State now has an increased number of ways to prove its case. But prove it it must; having alleged an owner, it must offer testimony of particular *facts* to support its allegations. In other words, we deal here not with a question of evidentiary admissibility or of a defect in the trial procedures, but a question of whether "certain facts existed and ... an appellate determination of insufficient evidence at [the] proceeding to establish those facts." *Bullard, supra,* at 1354.

We are confirmed in this view by the action of the Texas Court of Criminal Appeals in *Compton*

itself. Before rehearing, the Court of Criminal Appeals, using the older interpretation of ownership (and the one applied in *Carter v. State*), had held that the State had failed in its proof of ownership and had dismissed the case for *evidentiary insufficiency*. The court then held that *Burks* and *Greene* were a bar to reprosecution. Had the Texas Court of Criminal Appeals viewed the case as involving only trial error, it would not have invoked *Burks* and *Greene* to reverse the judgment to one of acquittal. We are of course not required to accept without question the state court's own characterization of what constitutes trial error as opposed to evidentiary sufficiency, *Bullard, supra*, at 1359-60; however in this case the characterization conforms with our own view and is moreover consistent with language in *Carter v. State, supra*, and *Easley v. State, supra*. We thus are able to defer to this characterization with some confidence. *Compare Bullard, id.* & n.25 with *Tapp v. Lucas*, 658 F.2d 383, 385 (5th Cir. 1981) (federal court could and would defer to a state court's view of error as trial error which was clearly a correct characterization).

The State of Texas argues that there can be no insufficiency of the evidence of constitutional magnitude, relying on *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); the State argues that a rational trier of fact could certainly have found Carter guilty at his first trial; hence double jeopardy should not attach even after the Texas Court of Criminal Appeals reversed for evidentiary insufficiency.

Reliance on *Jackson v. Virginia* is misplaced. We rejected the same argument when it was made in *Bullard*. 655 F.2d at 1360 n.27.

The State of Texas' final argument is that, assuming that the proof offered by the State was "technically insufficient" at Carter's first trial, the proper remedy is to give Carter a second trial. Because the defect at his first trial was remedied at the 1974 trial, the jury properly in-

structed and sufficient proofs given, the State argues that Carter has already received the only remedy which is due him. The State argues that invalidating the second trial gives Carter an unjust windfall after he has already received the benefit of a second trial, which is all that the Constitution should require.

This argument stands the double jeopardy clause on its head. If Carter has received a verdict of acquittal (or its equivalent under *Burks:* a finding of evidentiary insufficiency from a trial or appellate court), double jeopardy automatically attaches. At the risk of belaboring the obvious, this means that he may not be brought to trial again on the same charge. *E.g., Burks, supra,* 437 U.S. at 11, 98 S.Ct. at 2147; *Green v. United States,* 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). The purported fairness of any second trial is wholly irrelevant. For the second trial is not the remedy—it is the violation itself.

The sum of our analysis in this opinion leads to a single conclusion: Carter's 1974 trial and conviction violated the double jeopardy clause of the fifth amendment, as applied to to the states through the fourteenth amendment. The judgment of the district court, granting Carter a writ of habeas corpus, is affirmed.

AFFIRMED.

1. Cause No. 74-H-1603 has an extremely complicated history which we have not discussed in the above text, as the facts essential to the legal issues before us are complicated enough. A brief description, however, will give the reader some idea of the procedural skirmishing on both sides and the considerable judicial resources which have been expended in the process. No. 74-H-1603 was originally styled *Carter v. Heard;* later custody of Carter was transferred from the Harris County Jail to the Texas State Correctional System, and W.J. Estelle was substituted as Respondent. At this point, there were two habeas petitions styled *Carter v. Estelle,* the first one, No. 73-H-732, attacking the 1969 conviction, and the second, No. 74-H-1603, attacking the 1974 conviction. The attack on the 1969 conviction in No. 73-H-732 included an attack on the 1962 conviction used to enhance the 1969 conviction. A third *Carter v. Estelle,* Cause No. 76-H-19, sought restoration of lost prison "good time" credits. At one point, there were a total of eight habeas petitions filed by Carter against respondent Estelle pending in the federal courts. *See Carter v. Telectron, Inc.,*452 F.Supp. 944 (S.D.Tex. 1977).

Carter then began to file a series of amended petitions in No. 74-H-1603. On March 24, 1975, he filed a Motion for Leave to File a Third Amended Petition. This motion restated all of the claims asserted in the original petition and incorporated all of the grounds for attacking the 1969 conviction which were alleged in No. 73-H-732. Contemporaneous with the filing of the motion, Carter voluntarily dismissed No. 73-H-732. Apparently Carter was seeking to litigate all his claims against both the 1969 and 1974 convictions in one federal habeas proceeding.

At this point, the State of Texas filed a series of seven motions over a period of three years repeatedly requesting that No. 74-H-1603 be dismissed for failure to exhaust state remedies. The State of Texas argued that no state remedies had been exhausted in the 1974 conviction (No. 178,126), and that Carter had filed only one habeas petition attacking the 1969 conviction (No. 137,784). This petition, No. 137,784-A, did not plead the substantive grounds relied on in the federal attack on the 1969 conviction; rather, it only raised a jail time credit question.

On November 22, 1976, District Judge Woodrow Seals issued an order in No. 74-H-1603. The District Judge stated that, as it had been "informed by the parties in open court that no Texas Court had yet addressed petitioner's contentions under the provisions of Section 11.07, Texas Code of Criminal Procedure [the

Texas habeas statute], the proceedings in 74-H-1603 would be stayed until Carter has made a good faith effort to exhaust state remedies. This stay did not include the several attacks on the 1962 conviction also present in No. 74-H-1603, but this fact had no effect on subsequent proceedings. See, n.5, *infra.* On October 13, 1977, No. 74-H-1603 was transferred to the docket of Judge Finis E. Cowan.

2. The first habeas challenge, No. 178,126-A, had alleged many of the same claims as No. 74-H-1603. It was dismissed by the Texas Court of Criminal Appeals on February 2, 1977, because No. 74-H-1603 was still pending in federal court. As we discuss more fully later on, Texas law prevents the Texas courts from passing on claims in a habeas case where an application for the same relief is pending in the federal courts. *Ex parte Green,* 548 S.W.2d 914 (Tex.Cr.App.1977).

3. The State of Texas argued that should this court decide that state remedies were not exhausted with respect to the double jeopardy claim, Carter would have to dismiss No. 74-H-1603-A in order to proceed in state court. To avoid waste of judicial resources in No. 74-H-1603-A, the court was asked to stay its hand to see whether Carter would in fact dismiss. This argument neglected the fact that swift consideration of No. 74-H-1603-A might also moot the issues in this case; however, the stay was granted and we must now attempt to clear up the resultant traffic jam.

The State of Texas has now argued before this court that we should reverse the district court for refusing to stay the present case until No. 74-H-1603-A is litigated. Texas has already gotten one stay in No. 74-H-1603-A; we see no reason to stay this litigation as well. Rather, we think it is time for someone to begin the process of resolving this enormously complicated situation.

4. The completely different approach which the federal courts take with respect to the problem of concurrent state and federal habeas proceedings is well illustrated by our decision in *Escobedo v. Estelle,* 650 F.2d 70, *modified on petition for rehearing,* 655 F.2d 613 (5th Cir. 1981). In *Escobedo,* the petitioner exhausted his state habeas remedies with respect to an attack on his 1970 felony theft conviction, and then brought a federal habeas petition alleging the same claim as his state petition. However in the meantime, the petitioner had been convicted of burglary in 1977 and the 1970 conviction had been used for enhancement purposes. The petitioner appealed his 1977 conviction in the state

courts, raising once again his challenge to the 1970 conviction used for enhancement; this appeal was pending when the petitioner brought his federal habeas action attacking the 1970 conviction on the same grounds.

The magistrate to whom the federal habeas petition was referred acknowledged that the attack on the 1970 conviction had already been made by the petitioner and rejected by the Texas courts through the Texas habeas procedures. However, the magistrate recommended that the interests of comity and sound judicial administration would be served if the federal courts abstained from consideration of the petitioner's claim as the pending state appeal of the 1977 conviction raised the same issue. The district court followed this recommendation and dismissed without prejudice.

On appeal, a panel of this circuit rejected this view. It held that as long as the petitioner's claim had been fairly presented once to the state courts, the exhaustion requirement was satisfied. The fact that the state court was again considering the same claim simultaneously with the federal courts did not rob the latter of the ability to pass upon the claim. 650 F.2d at 74. The panel initially reversed the district court, but, on rehearing, affirmed the dismissal of the petition on the grounds that the custody requirements of § 2254 had not been met. *Escobedo v. Estelle,* 655 F.2d 613 (5th Cir. 1981).

5. Although No. 74-H-1603-A was primarily a challenge to the 1969 conviction, it included attacks on the 1962 conviction as well. Judge Seals had stayed consideration of all claims except those challenging the 1962 conviction pending Carter's attempt to exhaust state remedies. After the severance, which disposed of the challenges to the 1974 conviction, what remained in No. 74-H-1603-A were attacks on the 1969 conviction, which had previously been stayed, and attacks on the 1962 conviction, which had not been stayed but upon which no further proceedings had taken place.

6. Moreover, the Court of Criminal Appeals' opinion in No. 178,126-B did state that it would dismiss because Carter was attacking the same conviction (No. 178,126) in state and federal court.

7. As stated earlier, the identity of the claims raised in federal and state court is apparently irrelevant for the purposes of *Ex parte Green.* It is enough that both pending actions deal with the "same matter", i.e., the same conviction.

8. That the requirement of exhaustion is not based on lack of jurisdictional power to issue the writ but rather is an accommodation of state interests has been reaffirmed many times. *E.g., Fay v. Noia,* 372 U.S. 391, 420, 83 S.Ct. 822, 838, 9 L.Ed.2d 837 (1963); *Bowen v. Johnston,* 306 U.S. 19, 27, 59 S.Ct. 442,446, 83 L.Ed. 455 (1939); *Galtieri v. Wainwright,* 582 F.2d 348, 354 (5th Cir. 1978).

9. The Supreme Court has explained that:

> The exhaustion doctrine is a judicially-crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a "swift and imperative remedy in all cases of illegal restraint or confinement." *Secretary of State for Home Affairs v. O'Brien,* [1923] A.C. 603, 609 (H.L.).

Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490, 93 S.Ct. 1123, 1127, 35 L.Ed.2d 443 (1973). *Cf. Younger v. Harris,* 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971), in which Justice Black eloquently stated the principles upon which "Our Federalism" rests:

> The concept does not mean blind deference to "State's Rights" any more than it means centralization of control over every important issue in our National Government and its courts. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legimate activities of the States.

10. Another example of the compromise is the fact that while state judicial process is allowed to proceed without interference from the federal courts, the state process is not completely immune from federal supervision. After exhaustion of state remedies, a petitioner may still go into a federal forum to have his federal claims heard again, even if fully and fairly litigated by the state courts, *Brown v. Allen,* 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), and even though this denial of res judicata effect might in other contexts show an insufficient respect for state judgments. *See Allen v. McCurry,* 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). It is interesting to note that this aspect of the compromise continues to be finetuned by succeeding deci-

sions of the Court. *See Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)(full and fair litigation of Fourth Amendment claims in the state courts will preclude later federal collateral attack).

The careful balancing of state and federal interests is present throughout exhaustion doctrine. For example, the principle that state should be given the right to consider constitutional claims using the complete corpus of state judicial machinery might, if taken to its full extreme, be thought to preclude habeas relief whenever any state remedy remains available. Thus, after exhausting appellate remedies, a petitioner would be relegated to the state's own habeas procedures, and then to repeated habeas applications if those were permitted. However, the Supreme Court has rejected that view and has not extended the principle that far. All that comity requires is that the issue is question have been presented once to the state's highest court, either on appeal or on collateral attack, and repeated applications, even if permitted by state law, are not necessary. *Wilwording v. Swenson*, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971); *Roberts v. LaVallee*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967); *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953). Nor is exhaustion necessary if the state's interpretation of federal law changes between the exhaustion of state remedies and the filing of a petition for federal habeas corpus. *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978). However, this circuit has understood the principle that the state courts be given the first right of consideration to extend to cases where there is a change which provides an effective state procedure or there is a fundamental change in federal interpretation of substantive federal law between the original exhaustion of state remedies and the filing of the federal petition. *Id.* In such cases, this circuit has struck the balance in favor of a return to state procedures.

The balancing of federal and state interests extends even to questions of the substantive scope of habeas relief. *Compare Rose v. Mitchell*, 443 U.S. 545, 562, 99 S.Ct. 2993, 3003, 61 L.Ed.2d 739 (1979), *with Stone v. Powell*, 428 U.S. 465, 491 n. 31, 96 S.Ct. 3037, 3051, n. 31, 49 L.Ed.2d 1067 (1976)(considerations of federalism different with respect to habeas enforcement of judicially-created rule of exclusion in Fourth Amendment and enforcement of Fourteenth Amendment rights against jury discrimination where former has only recently been applied to states and is only a judicially-created remedy and latter are directly applicable to states and are personal constitutional rights). *Cf. Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53

L.ed.2d 594 (1977)(enforcement of state-created contemporaneous objection rule in habaes cases dictated by principles of federalism and comity).

11. *E.g. Pitchess v. Davis*, 421 U.S. 482, 488, 95 S.Ct. 1748, 1752, 44 L.Ed.2d 317 (1975)(per curiam)(application for writ of prohibition denied by California Supreme Court could not be fairly read as an adjudication on the merits of the claim presented; state remedies held not exhausted where claim could be raised on normal post-trial direct appeal); *Ex parte Hawk*,321 U.S. 114, 116, 64 S.Ct. 448, 88 L.Ed. 572 (1944)(application for extraordinary writ did not serve to exhaust state remedies where normal state channels for review were available); *Tooten v. Shevin*, 493 F.2d 173 (5th Cir. 1974), *cert. denied*, 421 U.S. 966, 95 S.Ct. 1957, 44 L.Ed.2d 454 (1975)(denial of writ of prohibition to the Florida Supreme Court prior to state trial was insufficient for purposes of exhaustion where trial and appellate courts in Florida had yet to consider merits of claim).

12. *See also Lenza v. Wyrick*, 665 F.2d 804 (8th Cir. 1981)(petitioner's point raised in brief did not state "wherein and why" trial court erred in conformity with state procedural rules; claims held exhausted since substance of the complaint was before the state court); *Morrow v. Wyrick*, 646 F.2d 1229 (8th Cir.) *cert. denied*, __U.S.__, 102 S.Ct. 401, 70 L.Ed.2d 216 (1981)(same); *Tifford v. Wainwright*, 588 F.2d 954 (5th Cir. 1976)(failure by petitioner to produce a trial transcript due to indigency did not rob Florida courts of a fair opportunity to consider his claims).

13. We hasten to point out that the question whether a petitioner has sufficiently complied with state procedures in raising his claims is a different one from the question of procedural default and waiver which was considered in *Fay v. Noia* and later in *Wainwright v. Sykes*. *Engle v. Isaac*, __U.S.__at__ n.28, 102 S.Ct. 1558, at 1570 n.28, 71 L.Ed.2d 783 (1982); *Wainwright, supra*, 433 U.S. 72, 78-81, 97 S.Ct. 2497, 2502-2503, 53 L.Ed.2d 594 (distinguishing the exhaustion requirement from the issue of procedural default). *Wainwright v. Sykes* deals with the problem of when the petitioner's failure to raise a timely objection at trial creates an adequate state ground which prevents consideration of the petitioner's federal constitutional questions. In fact, the rule in *Sykes* presupposes that at the time the petitioner files his habeas petition in federal court, he has no availble state remedy, because the contemporaneous objection rule prevents further consideration of his claims by the state courts. Thus when *Sykes* applies, the petitioner's claims are likely to be exhausted within

the meaning of § 2254(b). *See Engle v. Isaac, supra,* at __n.28, 102 S.Ct. at 1570 n.28. Conversely, in the procedural default situation with which exhaustion doctrine is concerned, the petitioner has preserved his claim through objection at trial or is otherwise able to present it in the state courts; it is his later failure to comply with other state procedures which raises the question of exhaustion. The federal courts must then consider whether despite the lack of compliance, the state has been given a fair opportunity to consider the constitutional claims.

14. An early precursor of the statutory rule may be found in *Ex parte Royall* itself, where it was suggested that in cases of urgency, or cases involving foreign relations or where state process would be in conflict with special national interests, exhaustion was not required. 117 U.S. at 252, 6 S.Ct. at 740. An exception for this and other "special circumstances" has always existed. *Darr v. Burford,* 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761 (1950); *White v. Ragen,* 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348 (1945); *Ex parte Hawk,*321 U.S. 114, 117, 64 S.Ct. 448, 450, 88 L.Ed. 572 (1944). *See e.g., Cunningham v. Neagle,* 135 U.S. 1, 10 S.Ct. 658, 34 L.Ed. 55 (1890)(United States deputy marshal, held on charge of homicide committed in the performance of his duty to protect Justice Field, discharged on habeas corpus from state custody). *See generally* Annotation, 54 L.Ed.2d 873, 888-891 (1978); Hart and Wechsler, The Federal Courts and the Federal System 1491-1492 (2d ed. 1976). Moreover, *Ex parte Hawk* (decided at a time when re-litigation of federal claims was not permitted in habeas proceedings after a full and fair hearing in the state courts) had held that "where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, ... or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, ... a federal court should entertain [the prisoner's] petition for habeas corpus, else he would be remediless." 321 U.S. at 118, 64 S.Ct. at 450.

15. *E.g., Layton v. Carson,* 479 F.2d 1275 (5th Cir. 1973), and cases cited therein at 1276 (state supreme court recently rendered an adverse decision in identical case and no reason exists to believe that state court will change its position); *Galtieri, supra,* at 354-55 n. 13; *Reed v. Beto,*343 F.2d 723 (5th Cir. 1965), *aff'd. on other grounds, Spencer v. Texas,* 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed 606 (1967).

16. One commentator has well expressed the connection between the futility doctrine and the underlying compromise of federal and state concerns implicit in the exhaustion doctrine:

> This futility doctrine may seem difficult to reconcile with the theory of exhaustion. A state's corrective procedures may be fully effective to vindicate meritorious federal claims, and futility may merely reflect a lack of substantive merit. But just as a petitioner is not required to seek relief from the state again and again, it makes little sense, given the costs of delay, to require a petitioner to present the state courts with a claim recently and firmly rejected by them. Limited to such cases, the futility doctrine is sound. It both reflects the harshness of requiring a habeas applicant to postpone his federal hearing until he has completed a useless progession through the state remedial machinery and forestalls the wasteful use of judicial resources resulting from vain applications to state courts. Moreover, where state courts have adopted an inflexible and erroneous view of a federal claim, prompt federal review will hasten correction of state court errors and improve the role of the state courts as enforcers of federal law.

Note, *Developments in the Law-Federal Habeas Corpus,* 83 Harv.L.Rev. 1038, 1099 1100 (1970)(footnotes omitted).

17. *E.g., Rheuark v. Wade,* 540 F.2d 1282 (5th Cir. 1976)(delay in preparation of trial transcript for appeal); *Dixon v. Florida,* 388 F.2d 424, 425 (5th Cir. 1968)("[A]n inordinate and unjustified delay in the state corrective process may well result in the frustration of petitioner's rights and be such a circumstance to render that process ineffective"); *Galtieri, supra,* at 354 n. 12 and cases cited therein. *See generally* 17 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4264 at 645 & n. 52 (1978) and cases cited therein.

18. *See Dixon v. Florida,* 388 F.2d 424, 426 (5th Cir. 1968).

19. The other cases were *White v. Ragen,* 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348 (1945); *Woods v. Nierstheimer,* 328 U.S. 211, 66 S.Ct. 996, 90 L.Ed. 1177 (1946); *Loftus v. Illinois,* 334 U.S. 804, 68 S.Ct. 1212, 92 L.Ed. 1737 (1948); *Young v. Ragen,* 337 U.S. 235, 69 S.Ct. 1073, 93 L.Ed. 1333 (1949); and *Jennings v. Illinois,* 342 U.S. 104, 72 S.Ct. 123, 96 L.Ed. 119 (1951).

20. *Cf. Fay v. Noia,* 372 U.S. 391, 435, 83 S.Ct. 822, 847, 9 L.Ed.2d 837 (1963) which overturned the rule of *Darr v. Burford* that exhaustion of state remedies required petition to the United States Supreme Court after an adverse decision in the State Supreme

Court: "[O]ur decision today affects all procedural hurdles to the achievement of swift and imperative justice on habeas corpus." The doctrine of *Darr v. Burford* was seen as an unnecessary and burdensome complication of the exhaustion requirement and hence was overruled.

21. The Texas Court of Criminal Appeals dismissed Carter's double jeopardy claim even though the claim did not involve an attack on a prior conviction being challenged in federal court. As discussed earlier, we have no reason to assume that the double jeopardy claim raised alone now would be heard by the Texas courts while No. 74-H-1603-A is pending. Moreover Texas' policy of discouraging piecemeal litigation and the abuse of the writ doctrines developed to enforce that policy suggest the opposite. *See Ex parte Dora*, 548 S.W.2d 392 (Tex.Cr.App.1977); *Ex parte Carr*, 511 S.W.2d 523 (Tex.Cr.App.1974). Nor has either party even suggested that the double jeopardy claim could be raised by itself while the federal action is pending. In view of these factors, we think it would be unjust to remand Carter to the state courts on the basis of a theoretical possibility that an adequate state remedy exists for his double jeopardy claim.

22. Carter urges upon this court an additional reason why he should not be put to the choice of dismissing his federal suit or delaying his state suit. The sentences for his 1969 and 1962 convictions, which he attacks in No. 74-H-1603-A, have already been served. Carter argues that if he dismisses the federal action and has his 1974 conviction overturned by the state courts, he will be unable to raise the claims in No. 74-H-1603-A in another federal habeas action. This is because, he claims, the custody requirements of § 2254 would no longer be satisfied. Carter is apparently relying on the statement in *Carter v. Hardy*, 526 F.2d 314,315 (5th Cir.), *cert. denied*, 429 U.S. 838, 97 S.Ct. 108, 50 L.Ed.2d 105 (1976), that "[h]abeas corpus lies essentially to challenge illegal restraint; the writ is not available where the sentence challenged has been fully served and is not being used for enhancement purposes." Accord, *Escobedo v. Estelle*, 650 F.2d 70, *modified on petition for rehearing*, 655 F.2d 613 (5th Cir. 1981).

We note that it is still an unsettled question in this circuit to what extent the use of an earlier sentence for enhancement purposes in a present sentence satisfies the custody requirement for the purpose of an attack on the former sentence. *See generally Escobedo v. Estelle, supra* (suggesting that requirement may be satisfied, if, according to the rule of *Sinclair v. Blackburn*, 599

F.2d 673, 676 (5th Cir. 1979), *cert. denied,* 444 U.S. 1023, 100 S.Ct. 684, 62 L.Ed.2d 656 (1980), petitioner can show a positive, demonstrable relationship between the prior conviction and the petitioner's present incarceration.) Relying on *Escobedo* and the doctrine of *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the State of Texas suggested at oral argument that the custody requirements in No. 74-H-1603-A may not be presently met even now due to a failure by Carter to make proper objections to the use of the 1969 and 1962 convictions at his 1974 sentencing hearing. *See Escobedo, supra,* 655 F.2d at 615 n. 4. The State has also argued that the claims in No. 74-H-1603-A should be dismissed in any case for failure to exhaust state remedies. However, these questions are not properly before us; they are for the decision of the district court judge who is hearing that case. We must and will assume that Carter's action in No. 74-H-1603-A is both properly in federal court and potentially meritorious.

We think that even if Carter could bring a new federal action after dismissal of 74-H-1603-A, putting him to such a choice is inconsistent with the purposes of the Writ and is a considerable waste of federal judicial resources. The habeas petition in question was first filed in 1974; the attacks on the 1969 and 1962 convictions were made by amendment in 1975. The opening section of this opinion has detailed the protracted procedural skirmishing engaged in by both sides and the considerable efforts of five federal judges and magistrates in coping with the legal contentions of the parties. Seven years after Carter's 1975 amendment his claims in No. 74-H-1603-A are finally ready to be heard by a federal district judge. To suggest that in order to have his attack on his 1974 conviction heard by the Texas courts, Carter dismiss his petition No. 74-H-1603-A and start the process of attacking the prior convictions all over again seems unreasonably wasteful and dilatory.

23. We are fully aware that a rule as complicated as the one Texas has created would present opportunities for such bad faith maneuvering. For example, a petitioner might attempt to "leapfrog" his claims into the federal courts as follows: first he brings A1 in state court, then, without exhausting it first, brings B2 in federal court. The state courts dismiss A1 and he then brings A1 in federal court claiming exhaustion because he has no available remedy in state court. However where such bad faith can be shown there is no reason to extend to these petitioners the same aid we would give to petitioners who are, through no fault of their own, caught in the quagmire of the Texas habeas abstention

rule. Moreover the federal courts have already developed a considerable caselaw beginning with *Fay v. Noia* which specifically deals with the identification of bad faith attempts by habeas petitioners to circumvent available state remedies. We have no doubt that this jurisprudence can be successfully adapted to the problems of bad faith in this context as well.

24. Since the overturning of Carter's 1972 conviction occurred prior to the decisions in *Burks* and *Greene*, the retroactivity of these decisions is a threshold question. However, we held recently in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982), that *Burks* does apply retroactively, and applied it to a habeas attack on the sentencing phase of a state trial. Thus our decision in *Bullard*, involving a challenge to a state trial, necessarily involved not only retroactve application of *Burks* but also retroactive application of *Greene*, which applied the rationale of *Burks* to the states through the fourteenth amendment. *See Bullard, supra*, at 1354 n.14. Texas has also applied *Burks* retroactively to its own decisions. *Ex parte Reynolds*, 588 S.W.2d 900 (Tex.Cr.App.1979), *cert. denied*, 445 U.S. 920, 100 S.Ct. 1284, 63 L.Ed.2d 605 (1980).

25. After the 1973 revision of the Texas Penal Code, the offense of embezzlement was consolidated with various other offenses into the single offense of theft. Tex.Pen.Code Ann. § 31.02 (West).

APPENDIX D

ALBERT H. CARTER, *Petitioner-Appellee,*

v.

W.J. ESTELLE, JR., Director, Texas Department of Corrections, *Respondent-Appellant.*

No. 80-1981.

United States Court of Appeals, Fifth Circuit.

Nov. 18, 1982.

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before POLITZ and RANDALL, Circuit Judges, and PARKER*, District Judge.

RANDALL, Circuit Judge:

On petition for panel rehearing and rehearing en banc, the State of Texas has asked us to reconsider our panel holding, 677 F.2d 427 (5th Cir. 1982), in the light of the Supreme Court's recent decision in *Tibbs v. Florida*, ___U.S.___, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). We are in agreement with the State that *Tibbs*

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* Chief Judge of the Middle District of Louisiana, sitting by designation.

has had a significant impact in the law of double jeopardy. As a result, we take this opportunity to modify several statements made in our earlier opinion in the light of *Tibbs*. However, as we show *infra*, the result in the case remains unchanged, and we reaffirm our conclusion that a writ of habeas corpus was properly granted by the district court, 499 F.Supp. 777, in this case.

The byzantine procedural history of the case is dwelt upon in considerable detail in our panel opinion and will not be repeated here. Suffice it to say that petitioner Carter was indicted for and convicted of embezzlement in 1972, his conviction was reversed by the Texas Court of Criminal Appeals in 1974, *Carter v. State*, 510 S.W.2d 323 (Tex.Cr.App.1974), and he was subsequently reindicted, tried, and convicted in the same year. Carter then filed one of his many habeas corpus petitions in federal court, claiming that his 1974 conviction was barred by double jeopardy because the 1972 conviction had been reversed for evidentiary insufficiency. We held that Carter's habeas petition met the requirements of exhaustion doctrine[1] and agreed that his 1974 reconviction violated the rule of *Burks v. United States*, 437 U.S.

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1. When this case was first argued before us, the major focus of debate was the exhaustion issue; however, the State has not contested our determination of this issue in its petition for rehearing, but has instead focused upon the double jeopardy issue. Ironically, the State conceded at oral argument that as the Texas courts construe their own and federal law, Carter, would clearly be entitled in a state habeas proceeding to reversal of his 1974 conviction under a double jeopardy bar. Counsel for the State argued that dismissal of the federal petition for failure to exhaust would thus not prejudice Carter's ability to challenge his 1974 conviction. When asked why the State was so eager to force Carter into a forum where the State would be sure to lose on the merits, counsel for the State made the interesting response that the State sought dismissal of the federal petition only to ensure that Texas courts would have the first opportunity to pass on the federal constitutional issues. The intervening decision in *Tibbs* apparently has altered its philosophy of litigation.

1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). Relying on our recent decision in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1981), *cert. granted*, ____U.S.____, 102 S.Ct. 2927, 73 L.Ed.2d 1328 (1982), we concluded that the 1978 decisions in *Burks* and *Greene* applied retroactively to the 1974 conviction and affirmed the district court's grant of habeas relief.

On June 7, 1982, a week after our opinion was issued, the Supreme Court decided *Tibbs*, and held that although reversals by an appellate court for evidentiary insufficiency continue to create a double jeopardy bar under *Burks*, reversal of a conviction because it was against the weight of the evidence does not preclude retrial. The State of Texas now claims that the reversal of Carters conviction was based on the weight and not the insufficiency of the evidence, and hence that *Burks* is inapplicable.[2]

It is perhaps an inevitable consequence of *Tibbs* that unsuccessful prosecutors will be tempted to recast every reversal for evidentiary insufficiency by an appellate court as a reversal based on weight so as to gain the "second bite at the apple," *Bullard, supra*, at 1362, forbidden them by the Constitution. But the Supreme Court's opinion in *Tibbs* itself makes clear that this strategy will meet with only limited success:

> [T]rial and appellate judges commonly distinguish between the weight and sufficiency of the evidence. We have no reason to believe that today's decision will erode the demonstrated ability of judges to distinguish legally insufficient evidence from evidence that rationally supports a verdict.

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2. Although the State nowhere explicitly raises the point, all of its arguments rely on the assumption that *Tibbs* applies retroactively to the 1974 conviction. For purposes of this opinion, we assume, without deciding, that since *Burks* applies retroactively, so does *Tibbs*.

____U.S. at ____, 102 S.Ct. at 2220 (footnote omitted).

The Supreme Court earlier in the opinion had itself given a succinct explanation of the difference between the two standards:

> A conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the appellate court into questions of credibility. The "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other."

Id. at ____, 102 S.Ct. at 2216 (quoting *Tibbs v. State*, 397 So.2d 1120, 1123 (Fla.1981)(Tibbs II)).

> *Burks v. United States* and *Greene v. Massey* carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial. In those cases, we held that the Double Jeopardy Clause precludes retrial "once the reviewing court has found the evidence legally insufficient" to support conviction. *Burks, supra,* [437 U.S.] at 18, 98 S.Ct., at 2150; *Greene, supra,*[437 U.S.] at 24, 98 S.Ct., at 2154. This standard, we explained, "means that the government's case was so lacking that it should not have even been *submitted* to the jury." *Burks, supra,* [437 U.S.] at 16, 98 S.Ct., at 2149 (emphasis original).

Id. ____U.S. at ____, 102 S.Ct. at 2217.

> A reversal on [the] ground [that the verdict is against the great weight of the evidence], unlike a reversal based on insufficient evidence, does not

Id. ___U.S. at ___, 102 S.Ct. at 2220-21 (footnotes omitted). The Court added in a footnote, *id.* at ___ n. 24, 102 S.Ct. at 2221 n. 24, that *Greene v. Massey* stands for the proposition that "the meaning attached to an ambiguous prior reversal is a matter of state law." Thus, both from its own reading of *Tibbs I*, the revelant Florida law, and later Florida cases construing *Tibbs I*, the Supreme Court concluded that the opinion was a reversal based upon the weight rather than the sufficiency of the evidence. The proper method of analysis having been explained by the Supreme Court, we now apply it to our own case.

We must first consider whether the language of the Court of Criminal Appeals suggests that it did in fact engage in a weighing of the evidence in *Carter v. State*, as the State claims it did. For ease of analysis, we here reprint the relevant portions of the court's brief opinion:

> The State's proof was that Andrew Dolce was the president of Consolidated Productions, Incorporated, a seller of plastic toys and animals, and that appellant was employed as a sales representative for that corporation, by virtue of which, so Dolce testified, appellant became his agent. Appellant's duties consisted of calling on and securing orders for the plastic items from schools and related organizations interested in selling the items in fund raising projects. Generally the orders secured were entered on an order form on which there was a prominently printed notice that all checks were to be made payable to Consolidated Productions, Inc.
>
> Some of the checks issued in payment for orders secured by appellant were made payable to and received by Consolidated Productions, Inc.; however, other checks were made payable to either the corporation and appellant or to appellant and were received by appellant. These latter checks were deposited in a bank account and withdrawn by

> mean that acquittal was the only proper verdict. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. This difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves.

Id. at ____, 102 S.Ct. at 2218.

The Supreme Court then considered the reversal of the first conviction in *Tibbs v. State,* 337 So.2d 788 (Fla.1976)(*Tibbs I*), and decided whether it rested on lack of weight or sufficiency.

> A close reading of *Tibbs I* suggests that the Florida Supreme Court overturned Tibbs' conviction because the evidence, although sufficient to support the jury's verdict, did not fully persuade the court of Tibbs' guilt. The plurality based its review on a Florida rule directing the court in capital cases to "review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not".... References to the "interests of justice" and the justices' own "considerable doubt" of Tibbs' guilt mark the plurality's conclusions. Those conclusions, moreover, stem from the justices' determination that Tibbs' testimony was more reliable than that of Nadeau. This resolution of conflicting testimony in a manner contrary to the jury's verdict is a hallmark of review based on evidentiary weight, not evidentiary sufficiency. Any ambiguity in *Tibbs I,* finally, was resolved by the Florida Supreme Court in *Tibbs II*, of course, the court unequivocably held that *Tibbs I* was "one of those rare instances in which reversal was based on evidentiary weight." 397 So.2d 1120, 1126 (1981)(per curiam).

appellant; the proceeds from these checks were not received by the corporation. The office manager of the corporation testified that all payments should have been remitted to the corporation, and that as a result of appellant's activities, the corporation sustained a loss of approximately $40,000. Andrew Dolce testified that, although appellant had authority to receive the checks in his capacity as agent and remit the money to the corporation, he did not give appellant authority or permission to convert the checks to his own use and benefit. *Dolce was not asked if, and he did not testify that, he was the owner of the money alleged to have been embezzled by appellant, or that, as president of the corporation, he had the care, control and management of such funds.*

In brief, the trial court charged the jury to find the appellant guilty if they found that appellant was the agent and employee of Andrew Dolce and that he did embezzle and convert to his own use without the consent of Dolce the money belongs to Dolce that had theretofore come into the possession of appellant by virtue of his employment as such agent and employee.

Having alleged ownership of the money to be in Andrew Dolce, the State was required to prove that essential allegation, Easley v. State, 167 Tex.Cr.R. 156, 319 S.W.2d 325 (1959), *although proof that Dolce was a special owner, under a proper charge of special ownership, would have been sufficient. Lawhon v. State,* 429 S.W.2d 147 (Tex.Cr.App.1968). The State maintains that the proof shows Dolce was the special owner of the funds and that the jury was charged accordingly so as to bring this case within the rule of *Lawhon.* We do not agree.

> In *Lawhon,* as here, the indictment alleged ownership of embezzled funds to be in an individual whom the proof showed to be the president of a corporation; but, in *Lawhon,* the proof showed further that the individual named in the indictment, as president of the corporation to which the embezzled funds belonged, had the care, control and management of the funds, and the court charged the jury that they might not convict unless they found that the president did have the care, control and management of the funds. *Here, the only evidence of ownership of the funds in question is the testimony that such funds should have been remitted to the corporation; there is no proof that Dolce either owned the funds or that, as president of the corporation, he had the care, control and management of such funds.*
>
> The State having failed to prove its allegation of ownership of the funds in question, a reversal of the conviction must follow. *Easley v. State,* supra. The ground of error submitted by appointed appellate counsel, whom appellant says cannot adequately represent him in this appeal, is sustained.

501 S.W.2d at 325-26 (emphasis added).

The State has argued in its petition for rehearing en banc that "the opinion of the Court of Criminal Appeals reversing the judgment of conviction is devoid of any language specifically finding that the evidence was insufficient on any element of the offense." Petitioner's brief at 7. Yet the Court's reference to *Easley v. State* shows that it regarded ownership as an essential element of the offense, and it specifically held that there was "no proof" that Dolce, the alleged owner, was the owner or special owner of the funds. 510 S.W.2d at 326. The State's characterization of this last passage is interesting:

> [T]he court suggested that the state might have cured any defect in its case by giving a charge on special ownership, *id.*, but that in the absence of such a charge, the weight of the evidence failed to show "that Dolce either owned the funds or that, as president of the corporation, he had the care, control and management of such funds." *(Id.).*

Petitioner's brief at 7.

Much as we are intrigued by the State's exercise in creative editing, we must point out that the words directly preceding the quotation from *Carter v. State* are not "the weight of the evidence failed to show" but rather "there is no proof." Moreover, the Court's point was not that the proof failed simply because no instruction on special ownership had been requested, but, that even if it had been requested and given, the case could not have gone to the jury because there was no evidence of special ownership by Dolce; i.e., care, control and management of the funds. The inescapable conclusion is that the reversal in *Carter v. State* was based upon a perceived evidentiary insufficiency and not a reweighing of the evidence by the Court of Criminal Appeals.[3]

It may perhaps be objected that this variance between the indictment and proof is not the sort of error which should constitute evidentiary insufficiency and require application of *Burks.* But the Texas courts have consistently so held. Texas case law makes clear that

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3. The State contends that the Court of Criminal Appeals failed to construe the evidence in the light most favorable to the jury's verdict, pointing out that its unsuccessful petition for rehearing in *Carter v. State* has raised this very issue. Of course, it is likely that rehearing was denied precisely because the court felt it had viewed the evidence properly. Nevertheless, the State argues that there is no language in the opinion which indicates that the Court of Criminal Appeals applied the correct standard for assessing evidentiary sufficiency. However, we think the finding of "no proof" indicates that the proper standard was applied.

"where one person is alleged to own property, but it is shown to be owned by another, or by a corporation, the State has failed to prove ownership as alleged." *Roberts v. State,* 513 S.W.2d 870, 871 (Tex.Cr.App.1974)(reversing conviction because State has failed to show actual or special ownership.) We have already explained in our panel opinion how, in *Compton v. State,* 607 S.W.2d 246 (Tex.Cr.App.1980), *cert. denied,* 450 U.S. 997, 101 S.Ct. 1701, 68 L.Ed.2d 197 (1981), the Court of Criminal Appeals, under the older interpretation of the concept of ownership (and the same one used in *Carter*), stated that a failure of proof of ownership by the person alleged in the indictment required reversal and application of *Burks* and *Greene;* on rehearing the court reinterpreted the definition of ownership so as to sustain the conviction. *See* 677 F.2d at 453-54. Although the original opinion in *Compton* was modified on rehearing, the rule that a failure of proof of actual or special ownership as alleged is treated by the Texas courts as requiring application of *Burks* and *Green* is still sound. The Court of Criminal Appeals so held in *Gibbs v. State,* 610 S.W.2d 489 (Tex.Cr.App.1980), decided after *Compton,* and relying in part on the 1974 opinion in *Carter v. State.* In *Gibbs,* the defendant had been convicted of theft of a socket kit owned by Montgomery Ward and Company. The court explained:

> As noted in the summary of the evidence, no witness testified that Montgomery Ward and Company, Incorporated, owned the socket set. Under these circumstances, we are led to the ineluctable conclusion that reversible error has been demonstrated. We say, as we did in *Roberts v. State,* 513 S.W.2d 870, 871 (Tex.Cr.App.1974): The State has failed to prove its allegations, and for this reason the conviction must be reversed. *Accord: Carter v. State,* 510 S.W.2d 323, 236 (Tex.Cr.App.1974); *Araiza v. State,* 555 S.W.2d 746 (Tex.Cr.App.1977).

> Having held that there is a fatal variance between the evidence adduced upon the trial and the information, we must reverse the judgment of the trial court. Under the rules enunciated in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); amd *Greene v. Masssey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), we are compelled to order the dismissal of the prosecution. *Doty v. State*, 585 S.W.2d 726, 728 (Tex.Cr.App.1979).
>
> The judgment is reversed and the prosecution dismissed.

Thus, as we explained earlier in our panel opinion, variances of this type are not regarded as mere trial error by the Texas courts but as evidentiary insufficiency.

In light of *Tibbs*, we now modify an earlier statement made in our opinion. There we said that we are not "required to accept without question the state court's own characterization of what constitutes trial error as opposed to evidentiary insufficiency." 677 F.2dd at 454 (citing *Bullard*, 655 F.2d at 1359-60). *Tibbs*, however, suggests that such a characterization is binding unless it would conflict with the due process clause. ____U.S. at ____, 102 S.Ct. at 2221. *Tibbs* explained that a reversal by a court under the disguise of evidentiary weight where the State's proof failed to meet the federal due process standards of evidentiary sufficiency outlined in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires a double jeopardy bar regardless of the characterization of the reversal. ____U.S. at ____ & n.21, 102 S.Ct. at 2220 & n.21. In such cases, the characterization is not binding because the failure of proof must be viewed as the equivalent of an acquittal.

However, even under this modification, the result in both the panel opinion and in *Bullard* would remain unchanged. In *Bullard*, we rejected the view that failure of

proof of prior convictions at the sentencing phase of a criminal trial constituted trial error, but we did so because there was insufficient evidence on an essential element of proof: the identity of the person convicted of the prior offense with the person being sentenced. That is to say, our analysis in *Bullard* did demonstrate the existence of a *Jackson v. Virginia* problem at the sentencing hearing which would indeed offend the due process clause. After our decision in *Bullard,* the Texas Court of Criminal Appeals reexamined its prior holdings and agreed that failure of proof of prior convictions at an enhancement proceeding creates a double jeopardy bar as a matter of federal law. *Cooper v. State,*631 S.W2d 508 (Tex.Cr.App.1982) (en banc), specifically overruling its decision in *Bullard v. State,* 533 S.W.2d 812 (Tex.Cr.App.1976). Whatever the retroactive effect of *Cooper,* it is clear that both our circuit and the Texas Court of Criminal Appeals are now in agreement that the characterization of the reversal of Bullard's sentencing as due to trial error was incorrect.

Furthermore, the Texas Court of Criminal Appeals has recently held that the Texas Constitution, Article I, Sections 14 and 19, as well as the United States Constitution, bars a retrial at either the punishment or guilt stage of the trial, where "the evidence is found lacking in the resolution of factual issues presented...." *Ex Parte Augusta,*639 S.W.2d 481 at 485 (Tex.Cr.App.1982)(en banc). In *Augusta,* as in *Cooper* and *Bullard,* the defendant was subjected to multiple sentencing hearings to determine if he had committed two prior offenses which would lead to a finds of habitual offender status and to an enhancement of his sentence. At both Augusta's first and second trials, the State had failed to prove that Augusta's second previous felonly conviction had been committed after the first previous conviction became final. The trial court had granted the defendant a new trial because it determined that the evidence presented by the State at the punishment stage was insufficient to establish the alleged sequence of the prior felony convic-

tions. The Court of Criminal Appeals held that this finding of insufficiency of the evidence barred relitigation of the defendant's habitual offender status under both the Texas and United States Constitutions. Thus, the Texas courts have held that the Texas Constitution provides an independent state ground for barring the relitigation of factual issues insufficiently presented at an earlier trial.

As for the panel opinion in *Carter,* the statement that we were not necessarily bound by the State's characterization of the reversal as trial error or evidentiary insufficiency was dicta, for we agreed with that characterization and applied it to the case. Obviously, there can be no claim that acceptance of this characterization offends the due process clause, for no masking of evidentiary insufficiency as trial error has taken place. It is, instead, the converse of the situation presented in *Bullard. Tibbs* requires that we accept the Texas court's characterization in these circumstances; we thus reiterate our view that cases like *Compton, Gibbs* and *Augusta* show that Texas regards failure of proof of ownership as alleged to require reversal not for trial error but for evidentiary insufficiency under both the Texas and United States Constitutions, and to require the application of a double jeopardy bar under both Constitutions.

Secondly, the State has reiterated its original argument in *Carter v. Estelle,* which we dismissed in a short reference to *Bullard v. Estelle.* 677 F.2d at 455 (citing 665 F.2d at 1360 n. 27). The State's position is that if Carter does not show that evidence at his trial was constitutionally insufficient under *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), so that no rational trier of fact could have found him guilty of every element of offense charged, the double jeopardy clause cannot apply to bar a second trial. The State seems to suggest that even though a Texas appellate court has already found the evidence insufficient as a

matter of state law, *Burks* does not apply unless we also decide that the conviction could not be sustained under federal law and *Jackson V. Virginia.* This was the argument we rejected in both *Bullard* and the panel opinion.

We have just explained that the Supreme Court was of the view in *Tibbs* that *Jackson v. Virginia* "places some restraints on the power of appellate courts to mask reversals based on legally insufficient evidence as reversals grounded on the weight of the evidence.... The Due Process Clause ... set a lower limit on an appellate court's definition of evidentiary sufficiency." ____U.S. at ____, 102 S.Ct. at 2220. Thus, if a state court reverses a verdict and characterizes it as based on weight or does not characterize it at all, insufficiency of the verdict under *Jackson v. Virginia* will create a double jeopardy bar nonetheless. However, when a state appellate court characterizes its reversal of a jury verdict as based upon a test of evidentiary sufficiency—that is, whether evidence exists on each element of the offense sufficient to convince a rational trier of fact—*Burks* applies at that point regardless of how a federal court might have applied *Jackson v. Virginia.* This is because a finding of evidentiary insufficiency means that acquittal was "the only proper verdict" under state law, *Tibbs, supra,* 102 S.Ct. at 2218, and this is equivalent to an acquittal according to *Burks.* In other words, once the state's highest court has decided under state law that the proof is insufficient to support a verdict of guilty, no further *Jackson v. Virginia* analysis by a federal court is necessary. We note that a situation very much like this was presented in *Hudson v. Louisiana,* 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), and the Court's unanimous opinion nowhere adverted to the need for a separate *Jackson v. Virginia* analysis on review to the Supreme Court. Instead, the Court took as controlling the fact that the Louisiana courts viewed the state's case as insufficient to go to the jury under Louisiana law.

We make this point not because we think that the *Jackson v. Virginia* standard is different from the state law standard of evidentiary sufficiency involved in *Hudson* and explained in *Tibbs*. Our point is rather concerned with the time at which a double jeopardy bar occurs. We think that a double jeopardy bar occurred when the Texas Court of Criminal Appeals decided in 1974 that there was no evidence of an essential element of the offense. As long as we are assured under *Tibbs* that this holding was indeed based on a finding of evidentiary insufficiency under state law, we are not free to disregard it in a habeas proceeding and refuse to apply a double jeopardy bar based on whether the conviction would or would not, in our opinion, also have offended *Jackson v. Virginia*.

Moreover, even if we believed that the State's highest criminal court was incorrect in holding that the evidence was insufficient under *Texas law*, we would have to respect its judgment, if the court purported to apply a test of evidentiary sufficiency as opposed to weight. For the double jeopardy clause applies even if the court made an error in applying the sufficiency standard to the record before it. 677 F.2d at 454 (citing *United States v. Scott*, 437 U.S. 82, 97, 98 S.Ct. 2187, 2197, 57 L.Ed.2d 65 (1978) and *Sanabria v. United States*, 437 U.S. 54, 64, 98 S.Ct. 2170, 2178-79, 57 L.Ed.2d 43 (1978)). As a federal court engaged in habeas review, we are not free to second guess the Court of Criminal Appeals' view that the case should not have gone to the jury under Texas law anymore than we could second guess an acquittal verdict by a Texas jury.

We must mention one further point which we raised on our own motion: the question whether the Texas Court of Criminal Appeals is even *empowered* to reverse a conviction because it is against the great weight of the evidence. The Supreme Court took pains in *Tibbs* to point out that although reversals based on weight were rare in Florida, they were indeed within the Florida

Supreme Court's jurisdiction. ____at ____ n. 8; 102 S.Ct. at 2215 n.8. While our understanding of the Texas Court of Criminal Appeals' decision in *Carter v. State*, as a decision based upon the sufficiency and not upon the weight of the evidence, permits up to leave this question for another day, we set forth some of the considerations bearing on the question for future reference and express the hope that the Texas courts will have an opportunity to address the question of the jurisdiction of the Court of Criminal Appeals before we are faced with the applicability of *Tibbs* to a double jeopardy challenge based on a claim that the verdict was against the weight of the evidence.

Article V, Section 6 of the Texas Constitution, which describes the jurisdiction of the Texas Courts of *Civil* Appeals, contains a proviso "that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error ...." *See also* Tex.Rev.Civ.Stat.Ann. art. 1820 (Vernon); Tex.R.Civ.P. 451, 453, 455. Neither the grant of jurisdiction to the Texas Supreme Court in Article V, Section 3, nor that given to the Texas Court of Criminal Appeals in Article V, Section 5, contains such a proviso. This proviso gives the Court of Civil Appeals its "fact jurisdiction", and in *Gulf, Colorado, and Santa Fe Railway Co. v. Latham*, 288 S.W.2d 289 (Tex.Civ.App.—Galveston 1956, writ ref. n.r.e.), "it was held that a contention that the verdict of the jury is against the overwhelming weight and preponderance of the evidence [so] as to be manifestly wrong presents a fact issue and invokes the fact jurisdiction of the Court of Civil Appeals." *White v. State*, 591 S.W.2d 851, 855 n. 4 (Tex.Cr.App.1979).

It has long been settled in Texas that the absence of fact jurisdiction in the Texas Supreme Court means that "the Supreme Court has no jurisdiction over points [of error] complaining that the finding of the jury was against the weight and preponderance of the evidence which are questions of fact over which Courts of Civil

Appeals have exclusive jurisdiction." *White, supra,* at 856. In *White,* the Texas Court of Criminal Appeals was asked to hold that a jury's verdict at a competency hearing "was 'so contrary to the great weight and preponderance of the evidence as to be manifestly wrong and unjust.'" *Id.* at 854. The Court of Criminal Appeals held that as its grant of jurisdiction was similar to that of the Texas Supreme Court, it did not have "jurisdiction to pass on the great weight and preponderance of the evidence ...." *Id.* at 856.

White v. State, however, did not resolve the issue. *White* arose in the context of a competency hearing which is, as *White* also held, a *civil* proceeding under Texas law. *Id.* at 853-54. Thus *White* could be distinguished as holding only that in reviewing civil verdicts of juries, the Texas Court of Criminal Appeals possesses no fact jurisdiction and may not reverse for lack of evidentiary weight, while it does possess such fact jurisdiction in crimnal cases. Nothing in *White* suggests that any such distinction was intended, and the constitutional grant of jurisdiction in Article V, Section 5 does not suggest such a distinction, but we acknowledge that it is a possible limitation on the decision.

Carter maintains, relying on *White,* that it is well settled that the Court of Criminal Appeals does not possess any jurisdiction to consider whether the finding of the jury is against the weight or the preponderance of the evidence. Article 38.04 of the Texas Code of Criminal Procedure states that except for legally mandated presumptions, "[t]he jury, in all cases is to be exclusive judge of the facts proved, and of the weight to be given to the testimony ...." *Accord,*Tex.Crim.Proc.Code Ann. art. 36.13 (Vernon). The Court of Criminal Appeals had held on numerous occasions prior to *Carter v. State* that a jury's verdict is conclusive on matters of credibility of witnesses and weight which is to be given to their testimony. *See, e.g., Floyd v. State,* 494 S.W.2d 828,

829 (Tex.Cr.App.1973); *Hopkins v. State,* 480 S.W.2d 212, 220 n. 5 (Tex.Cr.App.1972); *Northcutt v. State,* 478 S.W.2d 935, 936 (Tex.Cr.App.1972).

On the other hand, the State maintains that the Court of Criminal Appeals' jurisdiction to entertain questions pertaining to the weight of the evidence has been established since "the earliest days of the Republic." While a number of the cases cited by the State contain language suggesting that the court will reverse a jury verdict which goes against the "overwhelming weight" or "great preponderance" of the evidence, only one of the cases, dating from 1911, actually reversed a jury verdict on these grounds. *Green v. State,* 97 Tex.Cr.R. 52, 260 S.W. 195 (1911)(rape conviction based solely on victim's "remarkable" testimony reversed). In most of the cases, the court *affirmed* the verdict against a challenge to the *sufficiency* of the evidence. *See, e.g., Mitchell v. State,* 87 Tex.Cr.R. 530, 222 S.W. 983 (1920); *Taylor v. State,* 87 Tex.Cr.R. 330, 221 S.W. 611 (1920); *Wooldridge v. State,* 86 Tex.Cr.R. 348, 217 S.W. 143 (1920); *Roberts v. State,* 64 Tex.Cr.R. 135, 141 S.W. 235 (1911). In other cases, the verdict was reversed because the State produced *no* evidence on a factual issue, *see, e.g., Rucker v. State,* 599 S.W.2d 581 (Tex.Cr.App.1979); *Danzig v. State,* 546 S.W.2d 299 (Tex.Cr.App.1977); *Gardner v. State,* 85 Tex.Cr.R. 103, 210 S.W. 694 (1919); *Kiernan v. State,* 84 Tex.Cr.R. 500, 208 S.W. 518 (1919), or on grounds having nothing to do with the State's evidence, *Wilson v. State,* 128 Tex.Crim. 175, 79 S.W.2d 852 (1935) (juror misconduct). We note further, that all of the cases mentioning considerations of weight of the evidence were decided over forty years ago, and a number suggest that the jury is the sole judge of the weight of the evidence. *See Patrick v. State,* 105 Tex.Crim. 487, 288 S.W. 1078 (1926); *Wooldridge, supra.*

As stated above, we need not determine whether the Texas Court of Criminal Appeals is empowered to enter-

tain challenges to the weight of the evidence, as was the Florida appellate court in *Tibbs*, since the Court of Criminal Appeals held in *Carter* that there was *no* proof of an essential element of the defendant's crime. It is possible that before this issue is raised on a petition for habeas corpus relief in federal court, the Texas courts may speak directly to the issue.

Accordingly, the petition for panel rehearing is DENIED. No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

SO ORDERED.

NO. 82-1283

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

W. J. ESTELLE, JR.,

Petitioner

VS.

ALBERT H. CARTER,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Albert Houston Carter, Respondent herein, by and through Arnold Anderson Vickery, who in the courts below has been appointed under the Criminal Justice Act to prosecute the issues and grounds presented in the Petition of the Attorney General of the State of Texas. Albert Houston Carter respectfully requests the Court deny the Petition for Writ of Certiorari in this cause and as grounds therefor, would

respectfully show the Court the following:

OPINIONS BELOW

The United States District Court of the Southern District of Texas, Houston Division, on June 13, 1980 granted Respondent's Application for Writ of Habeas Corpus, pursuant to the statutory authority granted in 28 U.S.C. 2254. Respondent was released on that date upon the granting of Respondent's Motion for Summary Judgment. Respondent has not been reincarcerated during the pendency of these proceedings. That court's opinion was issued in Carter v. Estelle, 499 F. Supp. 777 (S.D.Tex. 1980). It is accurately reproduced in the Appendix to the Brief for Petitioner. The remainder of the opinions below are accurately cited in the Brief for Petitioner and such statement is adopted.

JURISDICTION

The statement of jurisdiction presented by the brief for Petitioner is correct and is adopted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of these provisions is accurately stated in Brief for Petitioner, and is adopted.

STATEMENT OF THE CASE

Respondent is presently released from custody pursuant to the June 13, 1980, order of the Federal District Court for the Southern District of Texas (McDonald, J.). On that date several motions were urged to that court by both Respondent (then Petitioner) Carter and Petitioner (then Respondent)

W. J. Estelle. The Court denied the State's various motions and granted Carter's Motion for Summary Judgment and ordered his immediate release from custody.

The procedural history of this case is both long and complex. However, it is important to set it forth in some detail to enable this Court to rule on the questions.

For approximately seven years prior to June 13, 1980, Carter was incarcerated pursuant to the judgment and sentence of the 185th Judicial District Court of Harris County, Texas, styled The State of Texas v. Albert H. Carter in Cause No. 178,126, for embezzlement-habitual.

The records reflect that Carter was previously convicted on April 20, 1962, in the United States District Court for the Middle District of Georgia, of the offense of perjury, and also of the offense of felony embezzlement in Cause No. 137,784 on November 4, 1969 in state district court in Houston, Texas. Punishment for the 1969 conviction was subsequently assessed at seven (7) years' confinement in the Texas Department of Corrections. On January 27, 1971, the Texas Court of Criminal Appeals affirmed the conviction on direct appeal. That conviction has been collaterally attacked by habeas corpus in both the state and federal forums and now pends in federal district court, Southern District of Texas, under Cause No. 74-H-1603A.

On September 21, 1972, Carter was tried and convicted in Cause No. 178,126 of the offense of embezzlement. Due

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to his two prior felony convictions, he was sentenced as an habitual offender to life imprisonment. On June 5, 1974, the Texas Court of Criminal Appeals, in a written opinion, reversed that conviction on the grounds of insufficient evidence presented by the State to support Carter's conviction. Carter v. State, Tex.Crim.App. 1974, 510 S.W.2d 323. The Court held that because the State had failed to introduce evidence to support the element of ownership in the person in whom ownership was alleged in the indictment, the conviction was invalid. On remand, Carter filed a pro se "Special Plea" in the district court urging double jeopardy as a bar to retrial. The plea was overruled[1] and upon retrial on the identical embezzlement charge, Carter was again convicted and a life sentence imposed. Although Carter took no direct appeal from this conviction and sentence, he filed a motion for new trial, referencing the special plea. A petition for removal to the federal court was denied.

On December 13, 1976, Carter filed a Post-Conviction Petition for Writ of Habeas Corpus in the convicting state district court which ordered an evidentiary hearing set for December 28, 1976. On December 28, 1976, the petition was denied, without evidence. The Court of Criminal Appeals dismissed on February 2, 1977.

On September 21, 1978, Carter filed another Post-

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1 No docket entries disclose the trial court's disposition of that Plea, so it must be presumed overruled by operaton of law.

Conviction Petition for Writ of Habeas Corpus in state court under Cause No. 178,126-B. On October 4, 1978, the State's answers was filed. On October 11, 1978, the petition was denied without relief. On October 18, 1978, the record of proceedings was mailed to the Court of Criminal Appeals. The Court of Criminal Appeals dismissed the petition on January 11, 1979.

Meanwhile, Carter sought habeas relief from the Federal District Court in Cause No. 74-H-1603, Carter v. Estelle. The specific reliance on the Burks v. United States, 437 U.S. 1 (1978) rule was raised in that case by supplemental petition filed on July 19, 1978, by the undersigned counsel. That particular ground had never been raised in any of Carter's collateral or direct attacks on his 1974 conviction. On August 21, 1978, Judge Cowan dismissed 74-H-1603 for lack of exhaustion of state remedies. Case No. 74-H-1603 was a "mixed" petition, however, which involved challenges to: (a) Carter's 1962 and 1969 convictions, for which Carter had then discharged his sentences and exhausted all state remedies, and (b) his 1974 conviction upon retrial under which Carter was serving a life sentence as an habitual offender and for which he had allegedly not exhausted all state remedies. Carter therefre moved the Court to vacate the judgment and bifurcate the case. Thus, on February 8, 1979, Judge Cowan severed 74-H-1603 into two cases designated "A" and "B". Case "B",

the challenge to the 1974 conviction and double jeopardy claim, was dismissed on exhaustion grounds. Case "A" was retained to secure Carter's right and opportunity to challenge his 1969 (7-year) conviction.

Finally, on March 9, 1979, with 74-H-1603-A still pending in federal court, Carter, to rectify his failure to exhaust state remedies for his 1974 conviction and to give the State adequate opportunity to address his double jeopardy claim, filed a Post-Conviction Petition for Writ of Habeas Corpus in the 185th State District Court under Cause No. 178,126C attacking his 1974 conviction and life sentence. The petition urged primarily the double jeopardy claim. In that petition, all grounds other than the double jeopardy claim here in question werepresented conditionally, e.g., Carter stated categorically that in the event relief was granted on his primary claim, i.e., that his retrial and reconviction violated double jeopardy, the other grounds incorporated (all pertaining to the validity of the 1974 sentence conviction) were moot. The State answered on April 30, 1979. The petition was denied without relief. The Court of Criminal Appeals dismissed by written order dated November 14, 1979, and summarily denied a motion for reconsideration

January 10, 1980[2].

Civil Action H-80-433, the case at bar, was filed by Carter on February 29, 1980, seeking a Writ of Habeas Corpus. This appeal lies from Judge McDonald's order of June 13, 1980, granting Carter's Motion for Summary Judgment and directing his immediate release.

The district court's ruling was affirmed by written opinion of the Fifth Circuit in Carter v. Estelle, 677 F.2d 427 (Fifth Cir. 1982). The Fifth Circuit denied Carter's petition for rehearing and suggested rehearing after entertaining briefs on written questions and briefs in support and opposition of the rehearing. Carter v. Estelle, 691 F.2d 777. Both of the Fifth Circuit opinions have been appended by the Appendix to the Brief for the Petitioner. The issues before the two lower courts were dual, and one has apparently been abandoned

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2 In pertinent part, the rationale offered by the Court of Criminal Alpeals in denying relief follows:

> In his present application, Carter admits that he has an application for writ of habeas corpus pending in the Unied States District Court for the Southern District of Texas, Houston Division, in an action styled Albert H. Carter v. W. J. Estelle, Jr., Civil Action No. 74-H-1603.
>
> In Ex parte Green, Tex.Crim.App. 1977, 548 S.W.2d 914, this court stated: "A petitioner must decide which forum he will proceed in because this court will not and the trial court in this state should not consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter. Ex parte Powers, Tex.Crim.App. 487 S.W.2d 101 (1972). See also Ex parte McNeal, Tex. Crim.App., 502 S.W.2d 157 (1977).

by the State in its Petition. The issue which has been abandoned centered on whether the Respondent had satisfied the requirements of the exhaustion doctrine, to entitle him to habeas corpus relief. The remaining issue is the retroactivity of the Burks v. United States and Greene v. Massey double jeopardy decisions, which bar reprosecutions after reversals of conviction, when the reversal is based on insufficient evidence in the first trial.

SUMMARY OF THE ARGUMENT

A.

Although this case was joined with Estelle v. Bullard, for argument before the Fifth Circuit, the possible future resolution of Estelle v. Bullard by this Court is irrelevant to the instant cause. Counsel for Petitioner suggests that this Court should defer resolution of this Petition until Estelle v. Bullard is decided on remand, by the Fifth Circuit. See Estelle v. Bullard, ___ U.S. _____, 102 S.Ct. 2927, 51 U.S.L.W. 3532 (January 18, 1983). Should this Court ultimately have to decide Bullard on the second issue presented for review, which is whether Burks/Greene and Bullington v. Missouri, are retroactive, this does not necessarily mandate the precise retroactivity question posited by the Petitioner in this cause. See, Estelle v. Bullard, ____ U.S. _____, 102 S.Ct. _____, 50 U.S.L.W. 3982 (June 15, 1982), citing Burks v. United States, 437 U.S. 1 (1978), Greene v. Massey, 437 U.S. 19 (1978) and Bullington v. Missouri, 451 U.S.

430, 101 S.Ct. 1852, 68 L.Ed. 270 (1981).

B.

The retroactivity of Burks v. United States, and Greene v. Massey, were a prerequisite to the holding of the court below that habeas corpus relief was properly granted by the District Court. It is undisputed that the facts presented by this case and its procedural posture fit squarely within the Burks/Greene doctrine, if it is to be applied. While several arguments have been variously advanced before the Courts below by the Petitioner to support the inapplicability of Burks/Greene to the case at bar, those grounds have apparently been abandoned in this Petition. Such grounds were that the evidence found to have been insufficient in the case at bar somehow was not "insufficient evidence for purposes of Burks/Greene", that the evidence was not found to be insufficient, and that federal courts had a duty and a right to examine the evidence presented in a state court trial proceeding to determine insufficiency for purposes of a Burks/Greene determination according to the reasonable doubt standard in Jackson v. Virginia, 1979, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573. The Petitioner now bases his entire argument for prospective-only application of Burks/Greene on detrimental reliance. The Petition would have this Court find as a matter of law that the character of reliance at the state court level was such that to avoid penalizing prosecutors for failing to adduce all evidence at the first

trial of Respondents such as Mr. Carter, this Court should leave unredressed violations of two of the most basic rights in Anglo-American jurisprudence. The application of Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1972), indicates that when a double jeopardy decision has as its foundation a fundamental right of Anglo-American jurisprudence, retrospectivity of that decision should be afforded. The two most fundamental doctrines in Anglo-American jurisprudence are at issue in the Burks/Greene decisions, and mandate the retrospective application of those decisions, as many courts have held. These two doctrines are that no person may be convicted except on evidence strong enough to convince the factfinder of the commission of each element of the crime charged; and, once acquitted, no person may be again tried for the same crime.

C.

While the decision in Robinson v. Neil was crafted by the Justices of this Court to allow for its application to a broad number of Constitutional cases, some of which necessarily would be decided in the future, the decisional factors are carefully stated and need not be amplified by this Court. To do so in this case would be to unduly restrict Robinson v. Neil and render it less useful in the analyzation of the propriety of retrospectivity for future cases as yet undecided.

The issue the Petitioner presents, contrary to the claim of the Petitioner in its argument, is not an important one to the criminal justice system of the State of Texas. Its resolution will not effect the fate of any state prisoners, and the Respondent challenges the Petitioner to prove otherwise, The retroactivity of Burks/Greene, has been decided against the Petitioner for several years in the state Petitioner represents. Because of the peculiar application of the exhaustion doctrine and the entangled procedural posture of this particular case, the State of Texas has had an opportunity to challenge Burks/ Greene in a forum other than the state courts. Therefore, the decision to grant certiorari in this case would be a decision to render an opinion which would be moot as far as the rest of the body of state prisoners in the Texas penal system. Any one of those prisoners can, on facts similar to those present in Mr. Carter's case, obtain relief by habeas corpus before the Texas courts of criminal appellate jurisdiction.

REASONS FOR DENYING THE WRIT

A.

WHILE ESTELLE V. BULLARD MAY BE DECIDED BY THIS COURT AT SOME TIME IN THE FUTURE, THAT RESOLUTION WILL NOT NECESSARILY DISPOSE OF THE QUESTION PRESENTED HERE.

A case known as Estelle v. Bullard has been posited as containing issues which are dispositive of those in this cause. Estelle v. Bullard is in a procedural position, which

indicates that, in all probability, the Supreme Court will never again review it. It has been remanded to the Fifth Circuit to determine whether independent state grounds exist for granting the relief that Bullard sought and won at the Fifth Circuit level so that the federal courts may avoid deciding the Constitutional issues presented. From a review of this Court's opinion remanding that cause, it is apparent that adequate state grounds, in all probability, do exist, which will require no further review by this Court. However, should this Court ultimately have to decide Bullard on the second issue presented for review in that cause, which is whether the cases of Burks/Greene and Bullington v. Missouri are retroactive in their application, it may very well be that the Court may decide the cause on the retroactivity of Bullington and never reach the issue of whether Burks and Greene are retroactive. The issue in Bullington, which is central to resolution of Estelle v. Bullard is whether Burks/Greene is applicable to prohibit the relitigation in a sentencing phase trial of the issues necessary for the death penalty, once the State has already failed to adduce sufficient evidence at the first such trial. While Bullard and Carter were joined for oral argument before the Fifth Circuit, the logic in such joinder does not mandate similar joinder before this Court. While the Burks/Greene determination may never be made in Bullard's case, the Bullington determination almost certainly will be. This may or may not dispose of

the question presented by the State in the instant petition.

B.

THE DECISIONAL LAW ACROSS THE UNITED STATES HAS UNIFORMLY HELD BURKS V. UNITED STATES AND GREENE V. MASSEY TO BE RETROACTIVE IN ITS APPLICATION TO CASES SUCH AS THAT PRESENTED BY THE STATE OF TEXAS IN THE INSTANT PETITION.

While the Fifth Circuit has stated that mere prospectivity of a decision enunciating constitutional rights should be the exception and not the rule, Chapman v. United States, 5th Cir. 1977, 553 F.2d 886, 890, constitutional decisions involving criminal rights pronounced by the Supreme Court are generally subject to the rules for prospectivity and retrospectively determined in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601, and its progeny. See, Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969).

The standard for retroactivity with respect to the announcement of a "new" constitutionally-based rule affecting criminal trials is four-pronged. Brown v. Mitchell, 4th Cir. 1979, 598 F.2d 835. These criteria may be enunciated as follows:

(1) The purpose to be served by the new rule announced;

(2) The extent of reliance by law enforcement officials on the old standard;

(3) The effect of retroactive application on the administration of justice; and

(4) The inequity that may result from prospective or retrospective application. Ramey v. Hurber, 4th Cir. 1979, 598 F.2d 753, 759-60.

However, in Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29, a case deciding the retroactivity of the "double sovereign" double jeopardy prohibition pronounced by the Fifth Circuit Court of Appeals in Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970), the Supreme Court carefully examined the applicability of the Linkletter-Desist standard to that double jeopardy decision specifically, and to double jeopardy decisions in general. Noting that Linkletter dealt with retrospectivity of procedural guarantee decisions of the court, the Robinson court distinguished Linkletter as inapplicable to the double jeopardy safeguard because "procedural" decisions essentially ensure fairness in the trial process, while the double jeopardy clause of the Fifth Amendment proscribed trial ab initio. Robinson v. Neil, 409 U.S. at 508-9, 93 S.Ct. at 878, 35 L.Ed.2d at 32-33. The Robinson court clearly relied upon the seminal double jeopardy decision of Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), which has been retroactively applied without reference to Linkletter, in its decision on the retrospectivity of Waller[19]. Robinson v. Neil, 499 U.S. at 506, 93 S.Ct. at 877, 35 L.Ed.2d at 31. The spectre of detriment flowing from state reliance upon the law of double jeopardy as it existed prior to Waller, while thoroughly explored by

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19 In his discussion of Benton v. Maryland's guarantee of the enforceability of the double jeopardy clause against the states, Judge Stewart declared that the retroactivity of that decision was established by its application

the Court, was simply not a deterrent to the Court in its decision to implement Waller on a retrospective basis.[20] It clearly relegated the reliance criteria to a position of much less weight than the purpose of the rule asserted to be retroactively applicable.

The Robinson retrospectivity test does not supplant that laid down by Linkletter; rather, they complement one another, and together provide a complete background against which one may, with care, gauge the retroactivity of important substantive and procedural rights guaranteed under the first eight amendments of the Constitution. Where a particular

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application to another of the Supreme Court's decisions on that same day. Ashe v. Swenson, 397 U.S. 436, 437 at n. 1, 90 S.Ct. 1189, 1191, 25 L.Ed.2d 469, 472. The writer observes that a similar but more pronounced stamp of retroactivity arises from the Supreme Court decisions in Greene v. Massey and McArthur v. Nourse, directly applying the Burks decision and handed down on June 14, 1978, and June 26, 1978, respectively. Since the effect of Benton v. Maryland was to apply the full panoply of the Constitution's prohibition against double jeopardy to the several states, and Greene was thus unnecessary for that purpose, the purpose for the decision on state grounds should be viewed as twofold: (1) illustration of the distinction between appellate reversals based on trial error and insufficiency of the evidence; and (2) an affirmative demonstration that Burks v. United States was to be applied retroactively. Robinson v. Neil, 409 U.S. 505, 508, 93 S.Ct. 876, , 35 L.Ed.2d 33 (1973).

20 Robinson v. Neil, 409 U.S. 505, 508, 93 S.Ct. 876, 877-78, 35 L.Ed.2d 29, 33.

constitutional right assures parity in the gathering and use of evidence or on particular methods of trial, the Linkletter criteria clearly apply. When such a procedural right secures the "very integrity of the fact-finding process" or bears on the guilt or innocence of the accused, Linkletter also applies, and generally accords retrospective effect. Cf., White v. Maggio, 5th Cir. 1977, 556 F.2d 1354. When, however, the courts must decide the retroactivity, a substantive constitutional right, the deprivation of which will inevitably taint the basic fairness of any trial, no matter how carefully conducted, Robinson requires the lower court to restore that right to the one deprived and undo the harm done, unless the policy interests of the state are so overwhelming in relation to the interest sought to be protected that they must take precedence and cannot be protected by any less restrictive means. Linkletter at629-30, 85 S.Ct. at 737-38, 14 L.Ed.2d at 608-9; Desist at 251-54 and n. 24, 89 S.Ct. at 1034-36, 22 L.Ed.2d at 256-58; Robinson at 509-10, 93 S.Ct. at 878-79, 35 L.Ed.2d at 33; Blackburn v. Cross, 5th Cir. 1975, 510 F.2d 1014, 1017-18, n. 2, rehearing denied 517 F.2d 464.

In the application of both tests, the policy interests of both the government and the defendant as described in the Linkletter criteria, are to be included in the scope of the court's decision process. It is in the weight accorded to each of those interests that subtle shifts are to be found in the breadth of the scope through which courts are directed to view requests for retroactive application of a constitutional

right. Prior decisions on retroactivity indicate that the court's most expanded scope, affording equal weight to each of the Linkletter criteria, is applied where the right bears least on the fundamental fairness of the conviction process. Then the courts can and should consider the equities, the reliance of lawmen and prosecutors on old law, the smooth administration of the judicial system, as well as the purpose of the rule. But the courts must jealously guard those substantive rights which form the framework of our criminal justice system by contracting the scope of its decision to focus almost entirely on the purpose of the rule which guarantees those rights. When faced with a question of retroactive application to redress the deprivation of such a right, the former criteria pale in significance and those rights remain inviolate.

Cases discussing the issue of the retroactivity of the Burks decision reveal that those courts adhere to this analysis and that having considered the purposes of Burks, find those purposes to have clearly favored retroactive application. In United States v. Bodey, the court held Burks retroactive under Robinson v. Neil, citing discussion in which the Supreme Court distinguished Linkletter from application in cases where the purposes of new rights enunciated in a constitutional decision bear upon a defendant's double jeopardy rights. United States v. Bodey, 6th Cir. 1979, 607 F.2d 265,

268, citing Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973). The Texas Court of Criminal Appeals has, virtually since the date of the Burks decision, recognized the dignity of the purposes behind that rule to afford it retroactive application in a plethora of cases,[21] most notably, Ex parte Reynolds, the pertinent reasoning of which was expressly adopted by the court below. Carter v. Estelle. S.D. Tex. [Houston] 499 F.Supp. 777, 786, (1980), citing Ex parte Reynolds, Tex.Crim.App., 588 S.W.2d 900, 902-4 (1979).

The retroactivity analysis here urged is further confirmed on comparison with that apparent in decisions regarding the retroactivity of various double jeopardy decisions other than Burks.

In Blackburn v. Cross, Judge Morgan wrote for the Fifth Circuit on the issue of the retroactivity of Wingate v. Wainwright, 5th Cir. 1972, 464 F.2d 209, a double jeopardy decision expanding the collateral estoppel (or "same issue") protection of Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), to bar the evidentiary use at trial of former charges of which a defendant has been acquitted. The court stated that Wingate forbade use of that which could "influence the fact-finding system," and thus was to be retroactively applied to invalidate Blackburn's conviction.

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21 Cf., Ex parte Colunga, Tex.Crim.App. 1979, 587 S.W.2d 426; Ex parte Dixon, Tex.Crim.App., 583 S.W.2d 793; Ex parte Mixon, Tex.Crim.App. 1979, 583 S.W.2d 378, en banc; Ex parte Duran, Tex.Crim.App., 581 S.W.2d 683; and Ex parte Moore, Tex.Crim.App. 1979, 579 S.W.2d 475.

Blackburn v. Cross, 5th Cir. 1975, 510 F.2d 1014, 1019. The purpose of the rule was the only criterion examined by Judge Morgan and no effect was given to reliance by the government on pre-Wingate rules.

The Fifth Circuit approached, but did not decide, a similar issue in United States v. Opager, 5th Cir. 1980, 616 F.2d 231. In that case, although it was unnecessary to reach the government's claim that Burks applied, the Court discussed its substantive application on the apparent assumption that it was retroactive. Id. at 235-36.

Appellant cites the Court to four retroactivity decisions from other circuits: Mizell v. New York, 2nd Cir. 1978, 586 F.2d 942, cert. denied, 432 U.S. 910; Jackson v. Justices of the Superior Court of Mass., 1st Cir. 1976, 549 F.2d 215, cert. denied, 430 U.S. 975; United States v. Rumpf, 10th Cir. 1978, 576 F.2d 818, cert. denied, 439 U.S. 893. Although two of these cases hold a double jeopardy decision to be retroactive and two do not, "scorecard" analysis is inaccurate and misleading here.

Examination and comparison of those cases clearly illustrates the analytic principle which guides these decisions on the retroactivity of double jeopardy rules: that only when the purpose of the rule fails to indicate that retroactivity is proper will the court broaden the scope of its inquiry to include the secondary weight factor of reliance. Mizell at 947; Holt at 1063, 1064, Jackson at 218-19; and Rumpf at 821.

The Court in Burks announced a double jeopardy rule based on two of the oldest doctrines in Anglo-American jurisprudence: (1) no person may be convicted except on evidence strong enough to convince the factfinder that each element of the crime charge was committed; and (2) once acquitted, no person may be again tried for the same crime. As the Robinson Court recognized[22], such rules have as their purpose man's basic desires for liberty, for only on the strongest evidence can free men incarcerate one another and, if such evidence is not produced, they will not subject the accused to the personal strain, public embarrassment, and expense of a second criminal trial. See, Abney v. United States, 431 U.S. 651, 661, 97 S.Ct. 2034, 2041, 52 L.Ed.2d 651, 661, (1977) citing, Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199.

These two constitutional rules are inextricably connected with the factfinding process and, where their retroactivity is urged, must be the object of the narrowest scope and scrutiny by the court, so that the greatest emphasis may be properly placed upon the purpose of these rules.

When the purposes of the Burks rule are thus placed in proper perspective, vis-a-vis those decisional factors which must remain secondary to this Court's decision on retroactivity, those purposes clearly require that this Court hold with the

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22 Robinson v. Neil, 1973, 409 U.S. 505, 509, 93 S.Ct. 876, 878; 35 .Ed.2d 29

Robinson court, that, while it will not wholly disregard the touted detriment flowing to the State of Texas, it will never elevate this detriment above such basic and substantive rights, the benefit of which Respondent has been deprived during his seven years of incarceration on a charge of which he was, in the eyes of the law, acquitted.

C.

DECISION BY THIS COURT OF THE ISSUE PRESENTED BY THE STATE OF TEXAS IS UNNECESSARY.

The issue presented by the State of Texas is not an important one to the criminal justice system of the State of Texas, although it may be an important issue in the decision of many states other than that represented by the Petitioner. For several years, the State of Texas has routinely applied Burks/Greene on a retroactive basis, with little or no difficulty. Petitioner states that it cannot know precisely the numbers of convictions that may eventually be invalidated by the holding of the Court of Appeals in this case. The Court of Appeals holding on the issue of the retrospectivity of Burks/Greene will have no effect in Texas, because Texas has had a similar rule since its decision in Ex parte Reynolds, Tex.Crim.App., 588 S.W.2d 900 (1979). This case discussed the application of Robinson v. Neil on retrospectivity and double jeopardy questions and was possessed of sound enough reasoning to have been adopted by the trial court as part of its opinion. Carter v Estelle, S.D. Tex. [Houston] 1980, 499 F.Supp. 777, thus, few or no prisoners in the Texas penal

system will be effected by the Court of Appeals decision, unless the procedural facts of their case are such that they must resort to relief on the federal level.

Robinson v. Neil, 409 U.S. 505 (1973), is a well reasoned decision, which was accurately viewed by its authors on this Court as necessarily broad. The decision was written at a time when burgeoning criminal defense theories were pointing out the routine violations of double jeopardy rights in the machinery of criminal jurisprudence. The decision was crafted to be broad enough to apply to the variety of fact situations which might be presented by the criminal procedures of forty-nine states other than that before the Court. The Petitioner invites this Court to rewrite and interpret Robinson v. Neil. To do so within the confines of Mr. Carter's case, with its twisted procedural history, would be to render a decision which would be so specific to Mr. Carter's case as to be merely confusing when construed with Robinson v. Neil. Thus, while this case may be important to the Texas Attorney General's Office, it is not, even were the retroactivity of Burks/Greene in question among the various circuits, a useful vehicle for providing an interpretation of Robinson v. Neil.

CONCLUSION

For the reasons pressed in this Petition, Respondent respectfully prays that the Petition for Certiorari not be held in abeyance until resolution of Bullard v. Estelle in the United States Court of Appeals for the Fifth Circuit, that the Petition be denied outright, and that the judgment of the Court of Appeals be affirmed in all respects.

Respectfully submitted,

VICKERY & WEBB

By _____
ARNOLD ANDERSON VICKERY
5615 Kirby Drive, Suite 700
Houston, Texas 77005
(713) 526-1100

Attorneys for Respondent
Albert Houston Carter

CERTIFICATE OF SERVICE

I, Arnold Anderson Vickery, attorney for Respondent do hereby certify that a true and correct copy of the above and foregoing Response in Opposition to Petition for Writ of Certiorari has been served by placing same in the United States Mail, postage prepaid, certified, return receipt requested, on this the 4th day of March, 1983, to Mr. Doughlas M. Becker, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711.

_____
ARNOLD ANDERSON VICKERY

IN THE SUPREME COURT
OF THE UNITED STATES

W. J. ESTELLE, JR. Petitioner	§	
V.	§	NO. 252-3025
ALBERT H. CARTER, Respondent	§	

§20:1166 MOTION -- FOR LEAVE TO
PROCEED ON APPEAL IN FORMA PAUPERIS;
~~REQUESTING APPOINTMENT OF COUNSEL~~
~~AND PREPARATION OF TRANSCRIPT AT GOVERNMENT EXPENSE~~
[18 USCS §3006A; 28 USCS §§ 753(f), 1915; FRAP 24(a)]

On January 28, 1983, petitioner, The State of Texas, filed a petition for writ of certiorari to the Supreme Court of the United States from the order affirming the issuance of a writ of habeas corpus entered in this case on August 12, 1980.

Counsel for Respondent, appointed under the Criminal Justice Act to represent the Respondent by the U. S. Magistrate at the District Court level and by the Fifth Circuit at the appellate level, moves the court pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure for an order:

1. Extending the grant of leave to respondent to proceed on appeal in forma pauperis without prepayment of fees or costs or giving security therefor, under the provisions of 28 USC § 1915;
2. Continuing the appointment of counsel to represent respondent on certiorari under the provisions of 18 USC § 3006A; and

3. Directing the reporter to prepare a transcript of the proceedings in this cause at government expense under the provisions of 28 USC § 753(f).

This motion incorporates the affidavit of respondent which was tendered to the Courts below in support of the original appointment of the undersigned counsel to Respondent's claims.

Respectfully submitted,

VICKERY & WEBB

BY: _____
ARNOLD ANDERSON VICKERY
Texas Bar No. 20571800
5615 Kirby Drive, Suite 700
Houston, Texas 77005
(713) 526-1100
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Motion was served on all counsel of record by certified mail, return receipt requested on this 21 day of March, 1983.

_____
ARNOLD ANDERSON VICKERY

IN THE SUPREME COURT
OF THE UNITED STATES

W. J. ESTELLE, JR. Petitioner	§	
V.	§	NO. 252-3025
ALBERT H. CARTER, Respondent	§	

§20:1167 ORDER - BY SUPREME COURT - GRANTING LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS, AND APPOINTING COUNSEL AND DIRECTING PREPARATION OF TRANSCRIPT AT GOVERNMENT EXPENSE
[18 USCS § 3006A; 28 USCS §§ 753(f), 1915; FRAP 24(a)]

The motion of respondent for an order granting leave to proceed in forma pauperis from the response to petition for certiorari of the above-entitled court entered on January 28, 1983, having come on for hearing this day; and the court being fully advised, and good cause appearing therefor,

IT IS ORDERED that defendant be, and he hereby is, permitted to proceed on response to certiorari in this matter in forma pauperis, without prepayment of fees and costs of this court or of the Court of Appeals for the Fifth Circuit, and without giving security for such fees and costs.

FURTHER ORDERED that a transcript of proceedings of the Court for inclusion in the record on certiorari be prepared for the use of the respondent, to be paid for by the United States under the provisions of 18 USC §3006A and 28 USC §753(f).

FURTHER ORDERED that Arnold Anderson Vickery is appointed counsel to prosecute this response.

Dated _____, 1983.

_____
JUDGE PRESIDING

No. 82-1283

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1982

W.J. ESTELLE, JR.,

Petitioner

V.

ALBERT H. CARTER,

Respondent

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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No. 82-1283

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

W.J. ESTELLE, JR.,
Petitioner

V.

ALBERT H. CARTER,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W.J. Estelle, Jr., Director, Texas Department of Correction, Petitioner herein, by and through his attorney, the Attorney General of Texas, and submits this his reply brief:

I.

THIS COURT SHOULD GRANT CERTIORARI OR HOLD THE PETITION IN ABEYANCE PENDING RESOLUTION OF *BULLARD V. ESTELLE*, ON REMAND FROM THIS COURT, IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

In the petition for writ of certiorari, it was noted:

> On June 14, 1982, the Court granted Petitioner's writ of certiorari in *Estelle v. Bullard*, No. 81-1774, to review the precise retroactivity-double jeopardy question Petitioner seeks to raise herein. *See, Estelle v. Bullard*, _____U.S._____, 102 S.Ct. 2927 (1982). The Court should defer action upon the instant petition pending the outcome of *Estelle v. Bullard*. [footnote one]. [On January 17, 1983, the Court reversed and remanded the judgment in *Bullard* so that the Court of Appeals might determine whether an adequate state ground independently supports the judgment.] If the judgment is affirmed in *Bullard*, then it may be appropriate to deny the petition for writ of certiorari in this case. If the judgment in *Bullard* is reversed, however, then it undoubtedly will be proper to grant the writ of certiorari in this case, and reverse and remand the judgment for reconsideration in light of the holding in *Bullard*. The Court may wish to defer consideration of this petition until the Court of Appeals has decided *Bullard*.

(Petitioner for Writ of Certiorari at 8).

Respondent suggests that *Estelle v. Bullard* is potentially irrelevant to this case, and further that in any event, the Court of Appeals will find that adequate and independent state grounds support the judgment in *Bullard*, thereby precluding any further review in this Court. (Respondent's Brief in Opposition at 10-11). Neither suggestion has merit.

A. To Suggest That *Estelle v. Bullard* Is Irrelevant To This Case Is Mere Speculation.

This case presents only a question of the retroactivity of *Burks v. United States*, 437 U.S. 1 (1979), and *Greene v. Massey*, 437 U.S. 19 (1978). Because *Estelle v. Bullard* also presents the issue of the applicability of *Burks* and *Greene* to the punishment phase of a Texas habitual offender trial, it additionally presents the issue of the retroactivity of *Bullington v. Missouri*, 451 U.S. 430 (1981). Since it is theoretically possible that ultimately *Bullington* may be held prospective only, Respondent is technically correct in suggesting that it is conceivable that the Court in *Estelle v. Bullard* may not reach the question of the retroactivity of *Burks* and *Greene*.

This possibility, however, must be viewed as both remote and speculative. It is remote because in light of the close inter-relationship among *Bullington*, *Burks*, and *Greene*, it is unlikely that the outcome of the retroactivity issue will vary with respect to any of these cases. It is speculative because Petitioner has merely suggested that the Court *await the outcome* of further appellate proceedings in *Bullard*. Awaiting the outcome will enable the Court to be informed whether the theoretical possibility suggested by Respondent will materialize. The Court might then base its decision whether to grant certiorari in the instant case upon reality, not speculation.

B. The Court of Appeals Will Hold That No Adequate And Independent State Ground For Relief Supports The Granting Of Habeas Corpus Relief In *Bullard v. Estelle.*

Respondent states that "in all probability" the Fifth Circuit Court of Appeals will find independent and adequate state grounds to support the judgment in that case. Petitioner has attached as Appendix A to this reply brief his recently filed brief and supplemental letter brief in the Fifth Circuit in *Bullard v. Estelle,* on remand from this Court. Perusal of Petitioner's Fifth Ciruit brief in *Bullard* reveals that it is beyond peradventure that although there may be an *adequate* state ground supporting the granting of habeas corpus relief in Bullard's case, there is no *independent* state ground supporting such relief. That is, although one Texas case has cited a provision of the Texas constitution, as well as federal authorities, in support of the granting of relief in a case resembling Bullard's, it is obvious that that portion of the Texas constitution has no meaning apart or different from the corresponding federal constitutional provision. Under *South Dakota v. Neville,* _____U.S._____, No. 81-1453 (U.S., Feb. 22, 1983); *Mills v. Rogers,* _____U.S._____, 102 S.Ct. 2442 (1982); *Oregon v. Kennedy,* _____U.S._____, 102 S.Ct. 2083 (1982); *City of Mesquite v. Aladdin's Castle, Inc.,* _____U.S._____, 102 S.Ct. 1070 (1982); *Delaware v. Prouse,* 440 U.S. 648 (1979); and *Zacchini v. Scripps-Howard Broadcasting Corp.,* 433 U.S. 526 (1977), no adequate and independent state ground serves as a barrier to this Court's review of the questions presented in that case.

II.

REVERSAL OF THE JUDGMENT IN THIS CASE WOULD HAVE A SIGNIFICANT EFFECT IN TEXAS, AS WELL AS ELSEWHERE.

Respondent suggests that a reversal of the judgment in this case would have no effect on Texas law because of holdings of the Texas Court of Criminal Appeals and, for that reason, few, if any, Texas prisoners would be affected by such a reversal. Although Respondent admits that unknown numbers of prisoners in other juridictions would be affected by this Court's holding on the merits of the issue presented, Respondent is wrong even with regard to his statements concerning Texas law and Texas prisoners.

Respondent argues, "The Court of Appeals' holding on the issue of retrospectivity of *Burks/Greene* will have no effect in Texas, because Texas has had a similar rule since its decision in *Ex parte Reynolds,* Tex.Crim.App. 588 S.W.2d 900 (1979)." (Respondent's Brief in Opposition at 21). Although the holding of the Court of Appeals has little effect in Texas for the reason stated, a reversal by this Court would amount to a reversal of *Ex parte Reynolds,* as well as the other Texas cases that stand for the same proposition.[1]

There is no contention whatsoever in this case, nor could there be, that the decisions in any of the cited Texas cases rest upon any adequate or independent state ground. No constitutional or statutory provision in Texas law is even cited in support of the judgment in any of those cases. The decisions rest solely upon the Texas Court of Criminal Appeals' view of the double jeopardy clause of the United States Constitution. Accordingly, reversal in this case would in effect overrule all the Texas cases relied upon by Respondent.

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1. *Ex parte Colunga,* 587 S.W.2d 426 (Tex.Crim.App. 1979); *Ex parte Dickson,* 583 S.W.2d 793 (Tex.Crim.App. 1979); *Ex parte Mixon,* 583 S.W.2d 378 (Tex.Crim.App. 1979); and *Ex parte Duran,* 581 S.W.2d 683 (Tex.Crim.App. 1979).

Accordingly, it remains true that a reversal by this Court will prevent the invalidation of the convictions of a large but unknown number of Texas prisoners, as well as the convictions of many prisoners in other jurisdictions. There are more that 36,000 inmates presently within the Texas Department of Corrections. All who are entitled to relief under *Burks* and *Greene* have not yet received relief. Obviously the holding of the Court sought by Petitioner in this case will have an immediate controlling impact upon all pending and future such cases.

III.

THE COURT SHOULD ACCEPT THIS OPPORTUNITY TO DECIDE WHETHER *ROBINSON V. NEIL*, 409 U.S. 505 (1972), MILITATES IN FAVOR OF THE RETROACTIVITY OF *BURKS* AND *GREENE*.

Respondent implicitly admits that the holding in *Robinson v. Neil* is so nakedly terse that its application has led to wildly varying results upon the retroactivity of double jeopardy questions in the lower courts. Yet Respondent incredibly argues that to amplify the holding would be "to unduly restrict *Robinson v. Neil* and render it less useful in the analyzation of the propriety of retrospectivity for future cases as yet undecided," (Respondent's Brief in Opposition at 10), and that the holding in *Robinson v. Neil* should not be explained because it is "broad enough to apply to the variety of fact situations which might be presented by the criminal procedures of forty-nine states other than that before the Court,"(Respondent's brief in Opposition at 22). The Court in *Robinson v. Neil* simply did not say enough to prevent divergent applications in double jeopardy-retroactivity cases in the lower courts, as pointed out in the petition at 10 n. 3. It could not be clearer that the lower courts are in need of additional guidance upon such issues.

As to the precise issue presented in this case, the retroactivity of *Burks* and *Greene*, two lower courts have decided in favor of retroactivity. The Sixth Circuit did so with no analysis whatsoever in *United States v. Bodey*, 607 F.2d 265 (6th Cir. 1979). The Texas Court of Criminal Appeals has done so with erroneous analysis in *Ex parte Reynolds*, 588 S.W.2d 900 (Tex.Crim.App. 1979), and in other cases cited *supra*, at 5 n.1. This Court should decide the question now.

Respondent seems to concede that his argument in favor of retroactivity amounts to one that all double jeopardy decisions should be held retroactive because, in his opinion, and as the Court of Appeals in effect stated in this case, there are no factors that can ever outweigh Respondent's "basic and substantive [Fifth Amendment] rights, the benefit of which Respondent has been deprived during his seven years of incarceration on a charge of which he was, in the eyes of the law, acquitted." (Respondent's Brief in Opposition at 21). Indeed, Petitioner has characterized the holding of the Court of Appeals as a per se holding that all double jeopardy decisions are retroactive. (Petition for Writ of Certiorari at 15). Such a startling development in constitutional law should be announced only by this Court, after plenary consideration of the matter.

IV.

CONCLUSION

For these reasons, Petitioner respectfully prays that his petition for writ of certiorari be held in abeyance until resolution of *Bullard v. Estelle* in the United States Court of Appeals for the Fifth Circuit, and that following the decision in *Bullard* that the petition in this case be granted, and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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NO. 80-2187

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES EDWIN BULLARD,
Petitioner-Appellee

V.

W J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent-Appellant

On Remand From
The United States Supreme Court

BRIEF FOR RESPONDENT-APPELLANT

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, Respondent-Appellant, and on remand from the United States Supreme Court submits this his brief:

STATEMENT OF THE ISSUE

DOES THE TEXAS CONSTITUTION, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS IN *EX PARTE AUGUSTA*, 639 S.W.2d 481 (Tex.Crim.App. 1982)(*en banc*), CONSTITUTE AN ADEQUATE AND INDEPENDENT GROUND FOR THE GRANTING OF HABEAS CORPUS RELIEF UNDER THE CIRCUMSTANCES OF THIS CASE?

STATEMENT OF THE CASE

The statement of the case set forth in the original brief for Appellant in this appeal provides the procedural history until this Court's affirmance of the holding of the district court in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982). (Brief for Appellant at 3-4).

Subsequently, on March 23, 1982, Appellant filed a petition for writ of certiorari in the United States Supreme Court. Appellee submitted his brief in opposition on May 20, 1982. On June 14, 1982, the Supreme Court granted the petition for writ of certiorari, limited to questions one and three presented by the petition. Those questions were as follows:

(1) Are *Burks v. United States*, 437 U.S. 1 (1978), *Greene v. Massey*, 437 U.S. 19 (1978), and *Bullington v. Missouri*, 451 U.S. 430 (1980), applicable to Texas habitual offender sentencing procedures?
(3) Are *Burks v. United States*, *Greene v. Massey, and Bullington v. Missouri*, retroactive?

Estelle v. Bullard, _____U.S._____, 102 S.Ct. 2927 (1982). On August 23, 1982, Appellant submitted his brief for Petitioner. After Appellee had submitted his brief for Respondent, he filed a motion to dismissed the petition for writ of certiorari as improvidently granted. Relying upon *Ex parte Augusta*, 639 S.W.2d 481 (Tex.Crim.App. 1982)(*en banc*), he argued that "an intervening court decision or change in a statute eliminated the issue or made it unlikely that the question would arise again, at least in the same context." (Motion to Dismiss at 2). On November 22, 1982, Appellant submitted his response to the motion to dismiss the petition for writ of certiorari. On January 17, 1983, the Supreme Court vacated the judgment and remanded the case to this Court for consideration of the question now before the Court.

STATEMENT OF THE FACTS

The statement of facts is adequately set forth in the original brief for Appellant at 5-9.

SUMMARY OF THE ARGUMENT

This Court's affirmance of the granting of habeas corpus relief in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982), was based solely upon the federal Constitution. Subsequently the Texas Court of Criminal Appeals in *Cooper v. State*, 631 S.W.2d 508 (Tex.Crim.App. 1982), in exclusive reliance upon the authority of *Bullard v. Estelle*, overruled *Bullard v. State*, 533 S.W.2d 812 (Tex.Crim.App. 1976), and three other Texas cases. The majority opinion is devoid of any reference to the Texas constitution.

A few months later, in *Ex parte Augusta*, 639 S.W.2d 481 (Tex.Crim.App. 1982)(*en banc*), the Court of Criminal Appeals decided that the double jeopardy clause of the Texas constitution, Tex. Const. art. I, §§14, 19, supported the same result that the court had reached in *Cooper v. State*. If the decision in *Ex parte Augusta* represents an adequate and independent state ground for relief, then apparently the Supreme Court will implement its general policy of avoiding constitutionally based decisions whenever possible.

Ex parte Augusta, however, is no such adequate and independent state ground. It is well settled that the mere citation of state constitutional or other authority in support of a principle with federal constitutional implications does not alone constitute an adequate and independent state ground for that principle. Where the state constitutional ground merely follows applicable federal law so that the state-based holding is congruent with the corresponding federally based holding, the state ground is not adequate and independent, but en-

tirely dependent upon that court's view of the applicable federal law. A reading of the Texas case cited above supports the principle that the citation to the Texas constitution in *Ex parte Augusta*, was simply a statement that its meaning is the same as the double jeopardy provisions of U. S. Const. amend. V. This conclusion is greatly strengthened by examination of the history of Texas' double jeopardy jurisprudence. Throughout the history of that jurisprudence, only extremely rarely has the Texas constitution even been cited as a ground for relief upon double jeopardy principles, much less ever been construed differently from the Texas courts' construction of federal constitutional law.

ARGUMENT AND AUTHORITIES

I. THE TEXAS CONSTITUTION, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS IN *EX PARTE AUGUSTA*, 639 S.W.2d 481 (Tex.Crim.App. 1982) (*en banc*), DOES NOT CONSTITUTE AN ADEQUATE AND INDEPENDENT STATE GROUND FOR HABEAS CORPUS RELIEF UNDER THE CIRCUMSTANCES OF APPELLEE'S CASE.

Appellant does not believe that the reversal and remand by the United States Supreme Court in this case is an intimation that this Court's prior holding in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982), is erroneous, or even that this Court's prior holding was deficient in any respect. Instead, it appears as an expression of the Court's reluctance to reach a constitutionally based decision when there exists an adequate and independent state ground for reaching the same result. E.g., *Mills v. Rogers*, _____U.S._____, 102 S.Ct. 2442 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, _____U.S._____, 102 S.Ct. 1070 (1982); *New York Transit Authority v. Beazer*, 440 U.S. 568, 582-83 n.22, 99 S.Ct. 1355, 1364

n.22 (1979); *Poe v. Ullman*, 367 U.S. 497, 502-09, 81 S.Ct. 1752, 1755-59 (1961); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 347-48, 56 S.Ct. 466, 483 (1936)(Brandeis, J., concurring). This policy is "supported, although not always required, by the prohibition against advisory opinions". *Mills v. Rogers*, _____U.S. at_____, 102 S.Ct. at 2452, citing, *United States v. Hastings*, 297 U.S. 188, 193, 56 S.Ct. 218, 220 (1935), prohibiting the Court from rendering "an expression of abstract opinion." The Supreme Court has often expressed its belief that the Courts of Appeals are in a superior position to determine whether there exists an adequate and independent state ground supporting the same result as the federal constitution might support. E.g., *City of Mesquite v. Aladdin's Castle, Inc.*, _____U.S. at_____, 102 S.Ct. at 1077. In making that determination in this case, Appellant urges the Court, as the Supreme Court has often said, that where the state law or constitution is "congruent with corresponding federal provisions," there is no independent and adequate state ground. *City of Mesquite v. Aladdin's Castle, Inc.*, _____U.S. at _____, 102 S.Ct. at 1076. Accord, *Zacchini v. Scripps-Howard Broadcasting Corp.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 2853 (1977); *Mental Hygiene Department v. Kirchner*, 380 U.S. 194, 198, 85 S.Ct. 871, 874 (1965); *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5, 71 S.Ct. 1, 3 (1950); *Minnesota v. National Tea Co.*, 309 U.S. 551, 554-55, 60 S.Ct. 676, 678 (1940); *State Tax Comm'n of Utah v. Van Cott*, 306 U.S. 511, 514, 59 S.Ct. 605, 606 (1939).

If the state law is thusly congruent with federal law:

> [O]ur correction of any federal error automatically would result in a revision of the Court of Appeals' interpretation of the Texas constitution. Instead of providing independent support for the judgment below, the Texas law, as understood by the Court of Appeals, would be dependent on our reading of federal law.

City of Mesquite v Aladdin's Castle, Inc., _____U.S. at _____, 102 S.Ct. at 1076-77.

Resolving the present issue is not in conflict with the well settled principle that a violation of state law cannot provide a basis for federal habeas corpus relief. That principle is firmly established by the language of 28 U.S.C. §2254(a), which authorizes a federal court to entertain an application for a writ of habeas corpus by a person held in state custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." It is a principle also firmly established in the jurisprudence of the Supreme Court, *Engle v. Isaac*, 456 U.S._____, 102 S.Ct. 1558, 1568 n.21 (1982); *Smith v. Phillips*, 455 U.S.____, 102 S.Ct. 940, 948 (1982); and a plethora of this Court's decisions. E.g., *Llamas-Almaguer v. Wainwright*, 666 F.2d 191 (5th Cir. 1982); *Van Poyck v. Wainwright*, 595 F.2d 1083 (5th Cir. 1979); *Butts v. Wainwright*, 575 F.2d 576 (5th Cir. 1978); *Loud v. Estelle*, 556 F.2d 1326, 1329 (5th Cir. 1977); *McKinney v. Parsons*, 513 F.2d 264, 267 (5th Cir.), cert. denied, 423 U.S. 960, 96 S.Ct. 376 (1975). As this Court has often said,

[W]e do not sit as a "super" state supreme court in a habeas corpus proceeding.

Billiot v. Maggio, 694 F.2d 98 (5th Cir. 1982); *Meyer v. Estelle*, 621 F.2d 769 (5th Cir. 1980); *Cronnon v. Alabama*, 587 F.2d 246, 250 (5th Cir. 1979); *Alvarez v. Estelle*, 531 F.2d 1319, 1322 (5th Cir. 1976), cert. denied, 429 U.S. 1044, 97 S.Ct. 748 (1977); *Martin v. Wainwright*, 428 F.2d 356, 357 (5th Cir. 1970).

This Court did not discuss the applicable provisions of the Texas constitution in its original opinion simply because they could have no relevance to the granting or denial of federal habeas corpus relief. The Court is asked to examine the state constitution on remand solely for

the purpose of aiding the Supreme Court's determination whether this case is a proper one for its review.

Nor does the existence of an adequate and independent state ground for relief support a dismissal of the case at this point for further exhaustion of state court remedies. It is well settled that after a habeas petitioner has once exhausted his state remedies, an intervening change in substantive federal law or an intervening change in procedural state law may require resubmission of a previously exhausted claim to the state courts. An intervening change in substantive state law, however, creates no such necessity, for the state courts have already had a full opportunity to apply state law to the facts of that particular case. *Francisco v. Gathright*, 419 U.S. 59, 95 S.Ct. 257 (1974); *Picard v. Connor*, 404 U.S. 270, 276, 92 S.Ct. 509, 512-13 (1971); *Roberts v. LaVallee*, 389 U.S. 40, 88 S.Ct. 194 (1967); *Galtieri v. Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978)(*en banc*); *Texas v. Payton*, 390 F.2d 261, 270 (5th Cir. 1968). [1]

With these principles in mind, Appellant now proceeds to a discussion of the issue upon remand.

Appellee's direct appeal from the judgment of conviction was affirmed in *Bullard v. State*, 533 S.W.2d 812 (Tex.Crim.App. 1976). This Court later held that resentencing Appellee violated the double jeopardy clause of U.S. Const. amend V. *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982). That decision also held retroactive the Supreme Court's decisions furnishing the basis for Appellee's cause of action. *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852 (1981); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2051 (1978); *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141 (1978).

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1. The Court's holding in *Canet v. Turner*, 606 F.2d 89, 91 (5th Cir. 1979), may represent an anomaly in this otherwise unanimous body of precedent.

On April 21, 1982, the Texas Court of Criminal Appeals decided *Cooper v. State*, 631 S.W.2d 508 (Tex.Crim.App. 1982). In exclusive reliance upon the authority of *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982), the Court of Criminal Appeals overruled *Bullard v. State*, 533 S.W.2d 812 (Tex.Crim.App. 1976), and three other Texas cases, *Porier v. State*, 591 S.W.2d 482 (Tex.Crim.App. 1979); *Kormurke v. State*, 562 S.W.2d 230 (Tex.Crim.App. 1978); *Tyra v. State*, 534 S.W.2d 695 (Tex.Crim.App. 1976). Two judges of the Court of Criminal Appeals in concurring opinions would have also adopted the rule in *Bullard v. Estelle* on the basis of the Texas constitution. The majority opinion of seven judges, however, is devoid of any reference to the Texas constitution.

More recently, On October 6, 1982, the Texas Court of Criminal Appeals again wrote upon the issue before the Court in *Ex parte Augusta*, 639 S.W.2d 481 (Tex.Crim.App. 1982)(*en banc*). The opinion was joined in by five judges; four others concurred in result only. Augusta affirmed the holding in Cooper, holding as follows:

> We believe that whether one applies the Double Jeopardy Clause of the Federal Constitution, see the Fifth Amendment to the United States Constitution, or applies art. I, Sections 14 and 19 of the Texas Constitution to the situation where the evidence is found lacking in the resolution of factual issues presented at the punishment stage of a trial, the State should not "get a second bite at the apple", at either a new punishment hearing or upon a retrial of the entire case. Thus, we hold that under either the Federal Constitution or the Texas Constitution, the State of Texas is precluded from relitigating an issue of fact at a second trial or at a second punishment hearing where it failed

> to properly litigate that factual issue at the first trial or at the first punishment hearing.

Ex parte Augusta, 639 S.W.2d at 485.

The essence of Appellee's contention in the Supreme Court that the writ of certiorari should be dismissed as improvidently granted is that the above reference to the Texas constitution furnishes an adequate and independent state ground supporting the granting of habeas corpus relief in this case. It appears to be Appellee's position that because he is now entitled to relief under the present state constitutional law in Texas, the present question is unlikely to arise again.

This contention is without merit. In *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979), a decision of the Delaware Supreme Court that the Supreme Court affirmed purported to rest upon provisions of both the federal and state constitutions. The Court held that review was not barred "where the state constitutional holdings depended upon the state court's view of the reach of the Fourth and Fourteenth Amendments." 440 U.S. at 653, 99 S.Ct. at 1396. Where it appears that the scope of the state and federal constitutions are similar, to hold that the lower court's analysis under federal law is inaccurate is to hold that the lower court's application of state law was equally erroneous. This principle was recently affirmed in *Oregon v. Kennedy*, ___U.S.___102 S.Ct. 2083, 2087 (1982):

> Even if the case admitted of more doubt as to whether federal and state grounds for decision were intermixed, the fact that the state court relied to the extent it did on federal grounds requires us to reach the merits. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 652, 568, 97 S.Ct. 2849, 2853, 53 L.Ed.2d 965 (1977).

This case is a classic illustration of the principles underlying *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct.

1391 (1979). In *Cooper v. State*, 631 S.W.2d 508 (Tex.Crim.App. 1982), the Texas Court of Criminal Appeals overruled several Texas cases and adopted the rule of *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982). The exclusive grounds of reliance were the reasoning in *Bullard v. Estelle*, and the United States Constitution. The seven-judge majority opinion is devoid of any reference to the Texas constitution. Judge Odom in his concurring opinion opined, "Today's decision should be grounded on both federal and state constitutional principles," 631 S.W.2d at 515, but the majority refused to do so.

In *Ex parte Augusta*, 694 S.W.2d 481 (Tex.Crim.App. 1982) (*en banc*), the court unanimously reaffirmed the holdings in *Bullard v. Estelle*, and *Cooper v. State*. The decision contains no additional reasoning whatsoever, but for the first time states that on the basis of the United States Constitution and the Texas constitution the rules in *Estelle v. Bullard* and *Cooper v. State*, should apply. The court in *Ex parte Augusta* gives no intimation or inkling of any suspicion that the applicable provisions of the Texas constitution have even a shade of meaning different from the applicable provisions of the United States Constitution. It is simply impossible reasonably to reach any conclusion except that, "[T]he state constitutional holding depended upon the state court's review of the reach of the Fourth and Fourteenth Amendments." *Delaware v. Prouse*, 440 U.S. at 653, 99 S.Ct. at 1396. If the Supreme Court were to reverse this Court's holding in *Estelle v. Bullard*, it is beyond speculation and in the realm of fantasy to imagine that the Texas Court of Criminal Appeals would do anything other than adopt that holding, particularly where four judges of the court refused to join in the opinion holding the Texas constitution applicable in the first place. Thus, as in *Delaware v. Prouse*, *Oregon v. Kennedy*, _____U.S._____, 102 S.Ct. 2083 (1982), and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97

S.Ct. 2849 (1977), it is most certainly true that there exists no adequate and independent state ground for the holdings of the Texas courts.

It is worth noting that in other cases applying double jeopardy principles to Texas prosecutions, the Texas Court of Criminal Appeals has been equally reluctant even to cite, much less construe differently from the federal Constitution, the double jeopardy and due process clauses of Tex. Const. amend. I, §§14, 19, respectively. Recently in *Ex parte McWilliams*, 634 S.W.2d 815 (Tex.Crim.App. 1982) (*en banc*) (on rehearing), the court was faced with a golden opportunity to base the survival of the Texas carving doctrine, which is plainly not mandated by the Double Jeopardy Clause of the United States Constitution, upon the Texas constitution. Four dissenting judges urged the majority to do so. A majority of the court, however, proclaimed that the same result will follow in "double jeopardy questions under the strict construction of the Constitution and this State." *Ex parte McWilliams*, 634 S.W.2d at 824.

Appellee's review of the other Texas cases in other areas of double jeopardy jurisprudence reveals exclusive reliance on the United States Constitution and no intimation whatsoever that the Texas Constitution differs in any respect from the federal regarding the scope of the double jeopardy clause. The Court of Criminal Appeals has followed the federal rule regarding the attachment of jeopardy, both before and after *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156 (1978). E.g., *Moore v. State*, 631 S.W.2d 245 (Tex.Crim.App. 1982); *Torres v. State*, 614 S.W.2d 436 (Tex. Crim.App. 1981); *Sanne v. State*, 609 S.W.2d 762 (Tex.Crim.App. 1980); *McElwee v. State*, 589 S.W.2d 455 (Tex.Crim.App. 1979); *Vardas v. State*, 518 S.W.2d 826 (Tex.Crim.App. 1975), cert. denied, 423 U.S. 904, 96 S.Ct. 206 (1976). The court has applied only federal constitutional principles where the prosecution has provoked a mistrial, *Durrough v. State*,

620 S.W.2d 134 (Tex.Crim.App. 1981), and in application of the manifest necessity doctrine, *McClendon v. State*, 583 S.W.2d 777 (Tex.Crim.App. 1979). The court has applied only federal law in deciding the effect of a former conviction, *Humphreys v. State* 565 S.W.2d 59 (Tex.Crim.App. 1978); a former acquittal, *Thompson v. State*, 527 S.W.2d 888 (Tex.Crim.App. 1975); and application of the collateral estoppel doctrine, *Warren v. State*, 514 S.W.2d 458 (Tex.Crim.App. 1974).

Indeed, although there may be other examples, Appellant knows of only one case in the history of Texas double jeopardy jurisprudence in which the state constitution was given any meaning whatsoever different from the Texas Court of Criminal Appeals' interpretation of the federal constitution. In *Foster v. State*, 635 S.W.2d 710 (Tex.Crim.App. 1982) (on rehearing *en banc*), a scant majority of the Court of Criminal Appeals relied upon the differing language of Tex. Const. art. I, §14, as compared to U.S. Const. amend. V, for the basis of its decision. The federal double jeopardy clause bars being "twice put in jeopardy." The state counterpart bars being "twice put in jeopardy" *and* being "again put upon trial." Based upon this difference in language, the Court of Criminal Appeals felt itself compelled to decide whether there was insufficient evidence in a case that the court had already decided must be reversed for a defective indictment. The significance of the sufficiency of the evidence question, of course, is that in the wake of *Burks v. United States* and *Greene v. Massey*, a retrial would be barred if the evidence were insufficient.

It is questionable whether even in *Foster v. State* the Court of Criminal Appeals reached a result different from the result that would be mandated by application of the federal constitution. The Supreme Court has held that a defective indictment does not prevent jeopardy from attaching. *Illinois v. Summerville*, 410 U.S. 458, 93 S.Ct. 1066 (1973); *Benton v. Maryland*, 395 U.S. 784,

796-97, 89 S.Ct. 2056, 2063-64 (1969); *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192 (1896). In any event, the holding in *Foster v. State* had nothing whatsoever to do with the holding in *Ex parte Augusta*. *Ex parte Augusta* relies upon none of the language of the Texas constitution cited by the court in *Foster v. State*. The two holdings are entirely separate and are not interrelated in any way. The holding in *Foster v. State*, therefore, as well as its reasoning, cannot provide a basis for a conclusion that *Ex parte Augusta* itself furnishes an adequate and independent state ground for the granting of habeas corpus relief in this case.

CONCLUSION

For these reasons, Appellant respectfully requests that the Court hold that there is no adequate and independent state ground for the granting of habeas corpus relief in Appellee's case.

Respectfully submitted,

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Attroneys For Respondent-Appellant

March 3, 1983

Hon. Henry A. Politz
Hon. Carolyn Randall
Hon. John V. Parker
Chief Judge, Middle District
of Louisiana, (sitting by designation)

RE: *Bullard v. Estelle,* No. 80-2087

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

The issue presented in this case upon remand from the United States Supreme Court is whether the Texas constitution provides an adequate independent state ground for the granting of habeas corpus relief. In Appellant's recently submitted brief, he argued that this case is indistinguishable from and controlled by *Delaware v. Prouse,* 440 U.S. 648, 98 S.Ct. 1391 (1979). In fact, the instant case was characterized as "a classic illustration of the principles underlying *Delaware v. Prouse,*" (Brief for Appellant at 11). Barely a week ago, the Supreme Court of the United States decided *South Dakota v. Neville,* _____U.S._____, No. 81-1453 (U.S., Feb. 22, 1983). The Court in *South Dakota v. Neville* held that its determination of the same question was governed by its holding in *Deleware v. Prouse. South Dakota v. Neville,* slip op. at 3-4 n. 5. Accordingly, the Court's holding in *Neville* strongly supports Appellant's position.

The substantive issue in *Neville* was whether the admission into evidence of the defendant's refusal to submit to a blood alcohol test, as explicitly authorized by a South Dakota statute, in a prosecution for driving while

intoxicated, offended his Fifth Amendment right against self-incrimination. The South Dakota Supreme Court had held, "[E]vidence of an accused's refusal to take a blood test violates the federal and state privilege against self-incrimination and therefore SDCL 32-23-10.1 is unconstitutional." *State v. Neville,* 312 N.W.2d 723, 726 (S.D. 1981). Thus, as Mr. Justice Stevens correctly noted, "[T]he South Dakota Supreme Court unambiguously held that the statute violated the State's Constitution." *South Dakota v. Neville,* slip op. at 1 (dissenting opinion of Stevens, J.). The majority of seven justices, however, noted that in spite of this holding, the South Dakota Supreme Court, after proceeding with its analysis under U.S. Const. amend. V, with appropriate citations of federal authority, merely "concluded without further analysis that the state privilege was violated as well." *South Dakota v. Neville,* slip op. at 3 n. 5. The majority stated:

> The analysis of the court below was remarkably similar to that of the state court opinion reviewed in *Delaware v. Prouse,* 440 U.S. 648, 651-53 (1979). The state court opinion analyzed various decisions interpreting the Federal Constitution, concluded that the Fourth Amendment violated the police procedure at issue there, and then *summarily held* that the State Constitution was therefore also infringed.

Id. at 3-4 n. 5. (emphasis added). The Court concluded,

> Although this would be an *adequate* state ground for decision, we do not read the opinion as resting on an *independent* state ground. Rather, we think the court determined that admission of this evidence violated the Fifth Amendment privilege against self-incrimination, and then concluded without further analysis that the state privilege was violated as well.

Id. (emphasis in original). The Court so held in spite of a footnote in the opinion of the South Dakota Supreme Court strongly suggesting that the comparable state and federal constitutional provisions were not co-extensive. *State v. Neville*, 312 N.W.2d 723, 726 n. *.

In his dissent, Mr. Justice Stevens argued, "In this case we lack jurisdiction because the South Dakota Supreme Court has not indicated, explicitly or implicitly, that its construction of Article 6, §9, of the South Dakota Constitution was contingent or our agreement with its determination of the Fifth Amendment to the United States Constitution." *South Dakota v. Neville*, slip op. at 2 (dissenting opinion of Stevens, J.). Thus, the majority specifically rejected Justice Stevens's view that

> Unless we have explicit notice that a provision of a State Constitution is intended to be a mere shadow of the comparable provision in the Federal Constitution, it is presumptuous—if not paternalistic—for this Court to make that assumption on its own.

Id.

The opinion of the Texas Court of Criminal Appeals in *Ex parte Augusta*, 639 S.W.2d 481 (Tex.Crim.App. 1982) (en banc), is remarkably similar to that of the South Dakota Supreme Court in *State v. Neville*. In holding that Petitioner Augusta was entitled to relief under the same circumstances as Appellee Bullard in this case, the Court of Criminal Appeals relied upon the authority and reasoning of *Burks v. United States*, 437 U.S. 19, 98 S.Ct. 2141 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151 (1978); *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852 (1981); and this Court's prior opinion in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982). The only state authority cited in support of the

substantive issue was *Cooper v. State*, 631 S.W.2d 508 (Tex.Crim.App. 1982), a decision that was devoid of even any reference to the state constitution or any other state ground for reversal. The opinion in *Ex parte Augusta* includes no discussion whatsoever of the applicable provisions of the Texas constitution, but instead, as in *State v. Neville*, simply summarily concluded that Augusta violated the double jeopardy clauses of both the federal and state constitutions. It appears beyond peradventure, therefore, "Although this would be an *adequate* state ground for decision, we do not read the opinion as resting on an *independent* state ground." *South Dakota v. Neville*, slip op. at 3 n.5 (emphasis in original).

The Supreme Court's opinion in *Neville* also illuminates the irrelevance of *Foster v. State*, 635 S.W.2d 710 (Tex.Crim.App. 1982). In *Foster*, the Court of Criminal Appeals examined a double jeopardy issue different from that presented in the instant case or in *Ex parte Augusta*. Based upon the holding and analysis of the court in *Foster*, a reasonable argument may be made that the Court of Criminal Appeals established an adequate and independent state ground for reversal by virtue of its reliance upon the differing language of the state and federal constitutional provisions regarding double jeopardy. *Foster v. State*, 635 S.W.2d at 714.

Similarly, in *State v. Opperman*, 247 N.W.2d 673, 674 (S.D.1976), the South Dakota Supreme Court in a case on remand from the United States Supreme Court emphasized the "independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution." Mr Justice Stevens relied upon *State v. Opperman* in his dissent in South Dakota v. Neville, slip op. at 4. The majority, however, apparently believed it to be irrelevant if in some other context the South Dakota Supreme Court had emphasized the independent nature of its own

constitutional provisions. The Court believed it to be of overriding importance that in the case before them, the South Dakota Supreme Court had failed to do so.

Accordingly, it is irrelevant whether in some other case pertaining to some other issue the Court of Criminal Appeals has established an adequate and independent state ground for granting relief. The Court of Criminal Appeals neglected to do so in *Ex parte Augusta* and *Cooper v. State*, the only state decisions pertaining to the issue presented in the instant case. That failure should reasonably preclude this Court from finding any adequate and independent state ground.

Respectfully submitted,

/s/ Douglas M. Becker

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